

I8DJMAN1

Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 GREGORY MANGO,

4 Plaintiff,

5 v.

17 Civ. 06784 VM

6 BUZZFEED, INC.,

7 Defendant.

8 -----x

9 August 13, 2018
10 9:00 o'clock a.m.

11
12 Before:

13 HON. VICTOR MARRERO,

14 District Judge

15
16 APPEARANCES

17 LIEBOWITZ LAW FIRM, PLLC

18 Attorneys for plaintiff

19 BY: JAMES H. FREEMAN, Esq.

20 JOSEPH ANTHONY DUNNE, Esq.

Of counsel

21 COWAN, DeBAETS, ABRAHAMS & SHEPPARD, LLP

22 Attorneys for defendant

23 BY: ELEANOR MARTINE LACKMAN, Esq.

24 BRITTANY LAINE KAPLAN, Esq.

25 Of counsel

Also Present:

GREGORY BREHM, VP & Assoc. General Counsel Buzzfeed, Inc.

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1 (In open court)

2 (Case called)

3 THE COURT: Good morning. Thank you. Be seated.

4 This is a proceeding in a matter of messenger versus
5 buff. It is Docket No. 17 Civ. 6784. We're here to proceed
6 with a Bench trial on the case.

7 The parties submitted a stipulation in which the
8 defendant accepted liability for copyright infringement by
9 virtue of the photograph that is at issue, and so what is here
10 today is a trial on the question of damages, if any, how much
11 and whether the defendant's conduct was sufficiently willful
12 and knowing to warrant punitive damages.

13 Is the plaintiff ready to proceed?

14 MR. FREEMAN: Yes, your Honor.

15 THE COURT: Ms. Lackman?

16 MS. LACKMAN: Yes, your Honor.

17 THE COURT: Are there any matters of procedure or
18 housekeeping or otherwise you may wish to discuss before we
19 proceed?

20 MR. FREEMAN: We don't believe so, your Honor. Thank
21 you.

22 MS. LACKMAN: No, your Honor.

23 THE COURT: In that case, let's go straight to it, Mr.
24 Freeman.

25 MR. FREEMAN: May I have brief opening statement?

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Trial

1 THE COURT: How long?

2 MR. FREEMAN: About 30 seconds.

3 THE COURT: That is long enough.

4 MR. FREEMAN: Back in December of 2017, the parties
5 submitted a joint letter to the court in which the plaintiff
6 indicated that we were seeking \$30,000 in civil penalty for
7 violation of the Copyright Act, 17 U.S.C. 501, and we were also
8 seeking \$5,000.00 for the defendant's violation of Section 1202
9 (b), and the evidence today will show why those substantial
10 damages award is warranted. Thank your Honor.

11 THE COURT: Thank you. Ms. Lackman.

12 MS. LACKMAN: Yes, your Honor.

13 There is not much to respond to except the evidence
14 will show on both the way the damages calculated in this
15 district does not warrant a lift up to \$30,000 for a photo at
16 most is worth \$150.00 for license abuse.

17 Secondly, the Section 1202 claim is meritless on its
18 face. There is, as the evidence will show, there is no
19 indication of not just willfulness and removal and claim
20 removal, but willfulness in the activities that are required
21 under the statute to be met, with a very high burden that 1202
22 requires.

23 THE COURT: Mr. Freeman.

24 MR. FREEMAN: We would like to call our first witness,
25 Mr. Michael Hayes.

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Hayes - direct

1 MICHAEL HAYES,

2 called as a witness by the Plaintiff,

3 having been duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 THE COURT: State your name and spell it for the
6 record.

7 THE WITNESS: Michael Hayes, M I C H A E L, H A Y E S.

8 THE COURT: Mr. Freeman.

9 DIRECT EXAMINATION

10 BY MR. FREEMAN:

11 Q. Hello, Mr. Hayes. Thank you for appearing today.

12 Would you please -- you stated your name for the
13 record. What is your occupation?

14 A. I'm a reporter.

15 Q. Your title?

16 A. Senior Reporter, BuzzFeed.

17 Q. How long have you had that position?

18 A. About five years.

19 Q. What kind of news stories do you report?

20 A. General news, breaking news, any news.

21 Q. What is breaking news? How would you define it?

22 A. That is kind of a strange question. It is any activity
23 that merits news coverage.

24 Q. Are you under time pressure to post news articles that you
25 would characterize as breaking news?

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Hayes - direct

1 A. I wouldn't call it pressure. There is an expectation to
2 produce articles in a timely manner.

3 Q. Does it matter whether you break the news before a
4 competitor reports on the same story?

5 A. Sometimes.

6 Q. How long have you worked at Buzzfeed?

7 A. Since March 2011.

8 Q. So about seven and a half years?

9 A. Yes.

10 Q. Prior to becoming a senior reporter, what was your
11 position?

12 A. Social media editor.

13 Q. Did the position of social media editor involve the use of
14 photographs?

15 A. Yes.

16 Q. While a social media editor for Buzzfeed, did you credit
17 photographers for their work?

18 A. Yes.

19 Q. In your current position as senior news editor, do you
20 customarily credit photographers by name?

21 A. By name or by photo outlet.

22 Q. Do you have an educational background in journalism?

23 A. Yes.

24 Q. Where did you attend school?

25 A. Fordham University.

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Hayes - direct

1 Q. Did you study photojournalism at Fordham?

2 A. No.

3 Q. Did you take a course in media law?

4 A. Yes.

5 Q. At Fordham, did you learn whether photographers are
6 supposed to be credited for their work?

7 A. Yes.

8 Q. Did you learn whether photojournalists or photographers are
9 considered the owners of the photographs they take?

10 A. I don't recall every aspect of my education.

11 Q. Where did you work as a journalist before joining Buzzfeed
12 in March of 2011?

13 A. I worked freelance.

14 Q. Did you use photographs in those positions?

15 A. Yes.

16 Q. Did you credit the photographer when using a photograph at
17 those positions?

18 A. Yes.

19 Q. Have you ever worked as a photographer or photojournalist?

20 A. I have produced news articles where I've incorporated my
21 own photography.

22 MR. FREEMAN: At this time, I would like to mark for
23 identification Plaintiff's Exhibit 37 and I would like to ask
24 the court's permission to approach the witness with the
25 exhibit.

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Hayes - direct

1 THE COURT: Yes. (Pause)

2 Let me ask the parties whether they prepared a binder
3 of exhibits that are not objected to?

4 MR. FREEMAN: We have prepared one binder, your Honor.

5 THE COURT: Are the exhibits in the binder all not
6 objected?

7 MR. FREEMAN: I believe there is going to be some
8 exhibits in the binder that will be objected to.

9 THE COURT: Well, would you be able to identify those
10 now?

11 MR. FREEMAN: We could do that, yes, your Honor.

12 Of course, you know, Ms. Lackman, we have had on
13 Thursday, we had an hour-long conversation, we walked through
14 each exhibit, so Ms. Lackman did want to reserve certain
15 objections, but we can walk through that now.

16 So there is not going to be an objection to Plaintiff
17 Exhibit 11. Plaintiff's Exhibit 13 to 19 --

18 MS. LACKMAN: Wait. Hold on a second.

19 So there is also in the interim the parties discussed
20 the fact that the plaintiff is not going to be using every
21 exhibit in the binder, so there are some exhibits to which we
22 do reserve objections, but as of Thursday it was still not
23 clear what the ultimate scope of exhibits were going to be from
24 the plaintiff.

25 So I will take, to the extent we are going through the

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Hayes - direct

1 pretrial order and that sort of thing, if we maintain an
2 objection, I'll take the fact Mr. Freeman is going over it to
3 mean it is not going to be included.

4 MR. FREEMAN: Correct. In other words, your Honor,
5 the joint pretrial order contains 95 exhibits, but we
6 substantially reduced those. In the table of contents in the
7 trial binder that has been provided to your Honor as as well to
8 defendant's counsel, there is substantially less, and we could
9 also state that many of these exhibits -- for example,
10 Plaintiff's Exhibit 13 to 19 -- are news articles in which Ms.
11 Lackman intends to object on the basis of hearsay. We have
12 prepared a very brief Bench memorandum to address that issue.

13 There is also, let's see, exhibits, Plaintiff exhibit
14 29 to 35 are all default judgment orders which the defendant
15 objects to putting into evidence.

16 Plaintiff's Exhibit 37, which is before the witness at
17 this time, I am not sure if you're still maintaining an
18 objection to that.

19 Plaintiff's Exhibit 38, 39, 41 and 44 are all news
20 articles that were written by the witness. I don't intend to
21 walk through all four. I would like to do at least one or two.
22 I am not sure if Ms. Lackman still maintains an objection to
23 those.

24 Plaintiff Exhibit 48 is a docket sheet from Massey
25 versus BuzzFeed. I anticipate that Ms. Lackman will make an

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Hayes - direct

1 objection to the admissibility of that document on relevance.
2 No objection to Plaintiff's Exhibit 69. No objection to
3 Plaintiff's Exhibit 72 through 81.

4 Ms. Lackman will need to inform us if she has
5 objections to 83, 84, 85. Then that leaves us with Plaintiff's
6 Exhibit 88, 89, 90 and 91, which are all the licensing fee
7 transactions as well assume areas thereof. Both sides have
8 summarized the licensing fee evidence.

9 We don't plan to object to the admissibility of the
10 defendant's submissions. We just believe the submission is not
11 entitled to any weight. I don't know if Ms. Lackman is going
12 to maintain objections to the licensing fee transactions.

13 Plaintiff's Exhibit 93 is correspondence between
14 plaintiff's counsel and defendant's counsel regarding discovery
15 deficiencies. Plaintiff's Exhibit 95 is another default
16 judgment. 96 is a stipulation of facts.

17 So at this stage if Ms. Lackman -- I think we worked
18 together to resolve these objections. I am not anticipating
19 that there is going to be many, but perhaps Ms. Lackman would
20 like to explain if there is any that she objects to at this
21 stage.

22 MS. LACKMAN: Sure. So the news articles all go to an
23 issue on which the court has already ruled. They appear to go
24 through the purported size and value of my client. The court
25 has already granted a motion in limine as to that topic in

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Hayes - direct

1 general. It is also hearsay, classic hearsay they're offering
2 for the truth of the matter asserted. We dispute that any of
3 that should come in. Of course, the court already made a
4 ruling on this issue and, therefore, on relevance. Therefore,
5 they should not come in for that reason as well.

6 Default judgment rulings, we don't believe are
7 evidence. These are orders of the court. They are not
8 relevant to this case, and so we believe they should not come
9 in as evidence on that ground.

10 Other articles written by Mr. Hayes, I am not quite
11 sure how they are hearsay. I am not quite sure how they're
12 intended to be used, and I think it makes sense to reserve an
13 objection until that time. I don't anticipate one, but it is
14 possible that this could arise, it could be used in a hearsay
15 manner.

16 Docket sheets again are not evidence, a different
17 case, apropos of nothing, essentially it is 402 and 403
18 evidence or should be ruled on and rejected under those rules
19 and should not come in, and we shouldn't spend time going
20 through docket sheets for decisions that have nothing to do
21 with this case. They can be raised if Mr. Freeman so chooses.
22 He can raise them in his post-trial briefing or otherwise.

23 Summaries of the licensing, Mr. Freeman is correct
24 both parties have summarizing licensing. We have objections as
25 to whether the summaries are actual summaries or not. I think

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Hayes - direct

1 Mr. Freeman feels the same way about ours. I have no objection
2 to the parties, to Mr. Freeman using that, assuming he has no
3 objection to our using it, and we can look at the admissibility
4 and weight for that.

5 As to correspondence between Mr. Freeman and me, I
6 don't think anybody wants that. I don't think it is relevant.
7 I object. I don't know that it has to do with anything. It is
8 discussion between the parties regarding scheduling this case.

9 The matter was never brought to the court. There was
10 no motion to compel, so we think that should be stricken, too,
11 and in that respect, that would reduce the volume significantly
12 of exhibits that remain in this case. This is not a
13 document-intensive case.

14 THE COURT: Thank you.

15 So in order to move as smoothly and efficiently as
16 possible, what the parties should do is if you come upon or
17 you're about to introduce a document, an exhibit that is not
18 objected to, I will assume on the record that it is admitted.

19 If there is an objection, then at that point we'll be
20 able to deal with it.

21 MR. FREEMAN: May I proceed?

22 THE COURT: Mr. Freeman.

23 BY MR. FREEMAN:

24 Q. Mr. Hayes, I would like to direct you to the exhibit marked
25 37. At the top of this document do you recognize the URL as

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Hayes - direct

1 Buzzfeed dot com/my case?

2 A. Yes.

3 Q. And Mr. Hayes and URL refers to you, correct?

4 A. Yes.

5 Q. Is it accurate to say this document contains screen-shots
6 taken from the URL?

7 A. Yes.

8 Q. The document contains headlines of articles that you've
9 written for publication by Buzzfeed?

10 A. Yes.

11 MR. FREEMAN: Plaintiff respectfully moves the court
12 for admission of Plaintiff's Exhibit 37.

13 MS. LACKMAN: No objection to the extent it is
14 represented as being true and accurate.

15 (Plaintiff's Exhibit 37 received in evidence)

16 BY MR. FREEMAN:

17 Q. Mr. Hayes, in the left-hand column you see, are these
18 thumbnails of photographs that were published along with each
19 article?

20 A. Yes.

21 Q. Is it accurate to state each of the news articles you've
22 written for Buzzfeed includes photographs?

23 A. Yes.

24 Q. Approximately how many Buzzfeed articles do you write per
25 day?

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Hayes - direct

1 A. It varies.

2 Q. And per week?

3 A. It also varies.

4 Q. Can you give me a ballpark.

5 A. Some days I write multiple articles, sometimes I write one
6 article a month.

7 Q. I see. Any idea how many per year?

8 A. No.

9 Q. Do all the news articles you write contain photographs?

10 A. I would say yes.

11 Q. When you publish a news story to BuzzFeed's web site, do
12 you personally upload that photograph which accompanies each
13 story?

14 A. Not always.

15 Q. So what would be circumstances where you don't upload the
16 photograph personally?

17 A. An editor or our photo editor might upload the photo.

18 Q. Where do you obtain photographs for use in your news
19 stories?

20 A. Wire services, we have photographers on staff. We also
21 hire freelance photographers.

22 Q. Do you ever obtain them from what is called stock photo
23 agencies such as Getty Images or Polaris?

24 A. Yes.

25 Q. Do you ever personally contact photographers directly?

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Hayes - direct

1 A. I don't understand the question.

2 Q. In other words, if you want to use a photograph for a
3 particular story, do you ever investigate the name of the
4 photographer and pick up the phone and call the photographer
5 directly to see if you could obtain permission to use the
6 photograph?

7 MS. LACKMAN: Objection. This calls for speculation?

8 THE COURT: Overruled.

9 A. I am sorry. I don't understand the question.

10 BY MR. FREEMAN:

11 Q. If you want to use a photograph for a news story, and you
12 want to include that photograph in your news story, do you ever
13 investigate the name of the photographer and attempt to contact
14 the photographer to obtain his or her permission to use the
15 photo?

16 A. I have contacted photographers and asked to use their
17 photos, yes.

18 Q. Does BuzzFeed employ photographers on staff?

19 A. Yeah. I already said that.

20 Q. My apologies.

21 Before posting a photograph to BuzzFeed's web site in
22 connection with the news article you write, do you need to
23 obtain clearance from the legal department at BuzzFeed?

24 A. Not always.

25 Q. What circumstances would you be required to obtain

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Hayes - direct

1 clearance?

2 MS. LACKMAN: Objection. We say this is privileged.

3 THE COURT: What is privileged?

4 MS. LACKMAN: A discussion as to when and whether he
5 consults counsel regarding whether a photograph can be used.

6 THE COURT: Overruled.

7 A. Would you repeat the question.

8 BY MR. FREEMAN:

9 Q. Before posting a photograph to Buzzfeed's web site, do you
10 need to obtain clearance from the legal department?

11 A. Not always.

12 Q. Under what circumstances would you be required to obtain
13 clearance to post a photograph?

14 A. From the legal department?

15 Q. Yes.

16 A. Our legal department reviews some, not all articles before
17 publication. In the instance where they review the article,
18 that would include reviewing the photos or artwork. In that
19 case, I would say that constitutes our lawyer's reviewing the
20 photos and artwork in a story.

21 Q. I see. So if the subject matter of the news article calls
22 for the legal department to review it, then in that
23 circumstance they would also review the use of the photograph?

24 A. I am not sure I understand what you're saying legal.

25 If you want me to repeat myself, some articles are

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Hayes - direct

1 reviewed by our legal department for publication. Through
2 those reviews they also review the artwork.

3 Q. Are you the one who selects what content or subject matter
4 you're going to write about on any given day?

5 A. Sometimes I select my own stories. Sometimes it is
6 assigned to me.

7 Q. Does BuzzFeed provide you with a weekly budget for
8 licensing photographs?

9 A. I'm not sure I understand the question.

10 Q. For example, would you say that if you want to use a
11 photograph, a licensing fee needs to be paid to the
12 photographer?

13 A. Not always.

14 Q. Does a licensing fee need to be paid to the copyright
15 owner?

16 A. We subscribe to Getty AP Images, Reuters Photo Services,
17 and typically use those photos and there's very little
18 discussion for including them in articles.

19 Q. But does BuzzFeed say to you, for example, you have \$500.00
20 a month as a budget to license photographs?

21 A. No.

22 Q. So what's the process of how you pay photographers for the
23 photographs you use in your news articles?

24 MS. LACKMAN: Objection. There is no foundation.

25 THE COURT: Sustained. Lay a foundation.

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Hayes - direct

1 BY MR. FREEMAN:

2 Q. I would like you to look back at Plaintiff's Exhibit 37,
3 and on the bottom-right-hand corner you're going to see what is
4 called a Bates stamp number, M A N G, followed by a number.
5 Can you turn to M A N G 147 about eight pages or so into the
6 document. It is M A N G 0147.

7 If you look down at the very bottom there, do you see
8 where it says through the picture on the -- Jeff Sessions,
9 Department of Justice lawyers fear Trump will scrap all their
10 work.

11 Do you see that, Mr. Hayes?

12 A. Yes.

13 Q. I would like to ask you about that article.

14 MR. FREEMAN: I would like to mark it Plaintiff's
15 Exhibit 38. Your Honor, may I have permission to approach the
16 witness with the document?

17 THE COURT: Yes, of course.

18 (Pause)

19 BY MR. FREEMAN:

20 Q. Mr. Hayes, do you recognize this document?

21 A. I am seeing it for the first time.

22 Q. Is it a screen-shot of a news article that you wrote as
23 senior news reporter for BuzzFeed?

24 A. Yes.

25 MR. FREEMAN: Plaintiff respectfully moves the court

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Hayes - direct

1 for admission of Plaintiff's Exhibit 38.

2 MS. LACKMAN: No objection.

3 THE COURT: Received.

4 (Plaintiff's Exhibit 38 received in evidence)

5 BY MR. FREEMAN:

6 Q. Under the article headline, Mr. Hayes, do you see there is
7 a photograph of president Trump and Attorney General Jeff
8 Sessions?

9 A. Yes.

10 Q. Underneath that photograph to the left there appears to be
11 two lines. The first line which is in bold face says President
12 Trump and Jeff Sessions.

13 The question is, is that line, as used to describe the
14 subject matter, depicted in the photograph?

15 A. Yes.

16 Q. The second line underneath reads, "Evan Lucci/AP"?

17 A. Yes.

18 Q. So Evan Lucci is the name of the photographer of this
19 photograph, correct?

20 A. Possibly. I believe so.

21 Q. And "AP" refers to Associated Press?

22 A. Yes.

23 Q. Is the line which refers to Evan Lucci known in the
24 industry as a gutter credit?

25 A. Yes.

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Hayes - direct

1 Q. Where did you get the credit information about this
2 particular photograph?

3 A. I don't recall exactly how I got it because this article is
4 over a year old. However, it is most likely that this photo
5 credit was included with this photo in the AP Photo Exchange
6 that we subscribe to.

7 Q. I see. When you wrote this news article, are you the one
8 who inputted the gutter credit information?

9 A. I don't recall. It is old.

10 Q. When you work in a news article, are there other editors at
11 BuzzFeed who contribute to your articles?

12 A. As I already said, photos can be added to articles by
13 either an editor or our photo editor.

14 Q. Did you obtain a written licensing agreement with the
15 photographer to publish this photograph?

16 MS. LACKMAN: Objection.

17 THE COURT: Overruled.

18 A. As I have already said, we subscribe to various photo
19 services like the AP, and through that subscription we have
20 access to these photos and are allowed to incorporate them into
21 our articles without individualized outreach to photographers,
22 if that is what you're suggesting.

23 Q. On the next page there is another photograph, and again
24 there is a couple of lines, three lines beneath the photograph,
25 the first being in bold face. Does that accurately describe

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Hayes - direct

1 the subject matter of the photograph?

2 A. Which photo are you referring to?

3 Q. One of Loretta Lynch, Benita Gupta and Chicago Mayor
4 Emanuel?

5 A. Yes.

6 Q. Once again, the italicized line which refers to Theresa
7 Crawford, is that the name of the photographer of the
8 photograph?

9 A. I believe so.

10 Q. Does BuzzFeed's legal department provide you with any job
11 training concerning how to credit photographers?

12 A. We have training on how to use photos in our articles, yes.

13 Q. Does BuzzFeed issue a written handbook or a training manual
14 which describes the proper use of photographs?

15 A. I'm not sure that I would call it a written handbook or
16 manual. There are several internal documents that describe the
17 training.

18 Q. Who currently supervises your work in BuzzFeed?

19 A. I report to various editors depending on what story I'm
20 working on.

21 Q. Who is Gregory Brehm?

22 A. He is a lawyer at BuzzFeed.

23 Q. And has Mr. Brehm informed you at any time that you're
24 required to credit the photographer for photographs you publish
25 on the BuzzFeed web site?

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Hayes - direct

1 MS. LACKMAN: Objection. This is privileged
2 information, what counsel advised.

3 THE COURT: Overruled.

4 A. I can't recall which member of our internal legal staff
5 most recently communicated that information.

6 BY MR. FREEMAN:

7 Q. Are you familiar with a person in the legal department
8 named Wajmah Yaqubi?

9 A. Yes.

10 Q. Are you familiar with Ms. Yaqubi's title?

11 A. No.

12 Q. Is she the director of rights and clearance at Buzzfeed?

13 A. Possibly, yes.

14 Q. Has Ms. Yaqubi ever informed you you're required to credit
15 photographers for photographs published on Buzzfeed's web site?

16 A. As I just said, I can't recall who in our legal department
17 informed me directly.

18 Q. Is there anyone else at Buzzfeed who provided training to
19 you in terms of properly crediting or licensing photographs?

20 A. We have multiple lawyers, as I've said, photo staff on
21 staff at Buzzfeed, and my recollection is several people have
22 been involved in training.

23 MR. FREEMAN: At this time I would like to mark
24 Plaintiff's Exhibit 13, your Honor. May I have the court's
25 permission to approach the witness?

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Hayes - direct

1 THE COURT: Yes.

2 (Pause)

3 BY MR. FREEMAN:

4 Q. Do you recognize this document, Mr. Hayes?

5 A. Yes.

6 Q. Is it a screen-shot of a news article published by the New
7 York Post on January 18th, 2017 about a man named Raymond
8 Parker?

9 A. Yes.

10 Q. Did you reference this New York Post article as a source
11 for a Buzzfeed article that you wrote about Mr. Parker?

12 A. I believe so.

13 MR. FREEMAN: Plaintiff respectfully moves the court
14 for admission of Plaintiff's Exhibit 13.

15 MS. LACKMAN: No objection.

16 (Plaintiff's Exhibit 13 received in evidence)

17 BY MR. FREEMAN:

18 Q. Under the headline, Mr. Hayes, there is a photograph of
19 Raymond Parker, correct?

20 A. Yes.

21 Q. Under the photograph of Mr. Parker, is that a gutter
22 credit?

23 A. It's very faint, but I believe there is a gutter credit.

24 Q. If you turn to the last page of the document that I've
25 provided, this is just a magnified version of the first page.

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Hayes - direct

1 I would like to ask you again, would it be accurate
2 that the two lines below the photograph of Mr. Parker is
3 referred to as a gutter credit?

4 A. There is no photo of Mr. Parker on the last page of this
5 document.

6 MR. FREEMAN: May I approach the witness, your Honor?

7 THE COURT: Yes.

8 MS. LACKMAN: I would like to lodge an objection. It
9 is just the sentence, there is no foundation that anyone has
10 ever seen an enlarged portion or this version of what is being
11 shown here.

12 THE COURT: Overruled.

13 MR. FREEMAN: Your Honor, it is identical, it is just
14 zoomed in, just a magnified version of Page 1 just so we can
15 read it quickly.

16 BY MR. FREEMAN:

17 Q. So the question is under the photograph of Mr. Parker, is
18 that a gutter credit?

19 A. In the blown-up version you just handed me?

20 Q. Yeah. You had said it was very faint, so I just wanted to
21 give you a magnified version of it, and so either way, whether
22 on Page 1 or on the page I just provided you, would it be
23 accurate to describe the line underneath the photograph of
24 Mr. Parker as a gutter credit?

25 A. Yes.

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Hayes - direct

1 Q. So the first line in bold face describes the subject matter
2 of the photograph, which is Raymond Parker, correct?

3 A. Yes.

4 Q. The second line shows a photograph named Gregory P. Mango,
5 correct?

6 A. Yes.

7 Q. I would like to mark as Plaintiff's Exhibit 73. Your
8 Honor, may I have the court's permission to approach the
9 witness?

10 THE COURT: Yes.

11 (Pause)

12 BY MR. FREEMAN:

13 Q. Do you recognize this document, Mr. Hayes?

14 A. Yes.

15 Q. This is the e-mail from you to Liane Fisher?

16 A. Yes.

17 MR. FREEMAN: The plaintiff respectfully moves the
18 court for admission of Plaintiff's Exhibit 73.

19 MS. LACKMAN: No objection.

20 (Plaintiff's Exhibit 73 received in evidence)

21 BY MR. FREEMAN:

22 Q. Who is Liane Fisher?

23 A. She is an attorney.

24 Q. Why did you contact Ms. Fisher?

25 A. She represents Mr. Parker.

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Hayes - direct

1 Q. How did you know that Ms. Fisher represented Mr. Parker?

2 A. She is identified in various legal documents pertaining to
3 his case as his attorney.

4 Q. You contacted her to solicit comment on an article about
5 Mr. Parker's settlement with the City of New York?

6 A. Yes.

7 Q. Thank you.

8 MR. FREEMAN: I would like to mark Plaintiff's Exhibit
9 74, your Honor. May I have the court's permission to approach
10 the witness?

11 THE COURT: Yes.

12 (Pause)

13 BY MR. FREEMAN:

14 Q. Mr. Hayes, do you recognize this document?

15 A. Yes.

16 Q. This is the e-mail from Liane Fisher in response to your
17 e-mail of 10:54 am, correct?

18 A. Yes.

19 MR. FREEMAN: Plaintiff respectfully moves the court
20 for admission of Plaintiff's Exhibit 74.

21 MS. LACKMAN: No objection, contingent on Ms. Fisher
22 testifying today.

23 MR. FREEMAN: Let the record reflect Ms. Fisher is
24 present in the courtroom.

25 THE COURT: Proceed.

I8DJMAN1

Hayes - direct

1 (Plaintiff's Exhibit 74 received in evidence)

2 BY MR. FREEMAN:

3 Q. This e-mail informs you that Ms. Fisher will call you back
4 within the hour?

5 A. Yes.

6 MR. FREEMAN: I would like to mark for identification
7 Plaintiff's Exhibit 75. Your Honor, may I have the court's
8 permission to approach the witness?

9 THE COURT: Yes.

10 (Pause)

11 BY MR. FREEMAN:

12 Q. Mr. Hayes, do you recognize this document?

13 A. Yes.

14 Q. This is the e-mail from you to Ms. Fisher?

15 A. Yes.

16 MR. FREEMAN: Plaintiff respectfully moves the court
17 for admission of Plaintiff's Exhibit 75.

18 MS. LACKMAN: Objection.

19 (Plaintiff's Exhibit 75 received in evidence)

20 BY MR. FREEMAN:

21 Q. So this email is in response to Ms. Fisher's e-mail of
22 11:16 am, correct?

23 A. Yes.

24 Q. Here you say, "the sooner the better." Do you see that?

25 A. Yes.

I8DJMAN1

Hayes - direct

1 Q. Mr. Hayes, were you in a rush to publish the article?

2 A. No.

3 Q. Was this a breaking news article?

4 A. Yes.

5 Q. If you weren't in a rush, then why did you say, "the sooner
6 the better"?

7 A. I wanted to get the story published in a timely manner.

8 Q. Is your job performance assessed by breaking news stories
9 faster than your competitors?

10 A. No.

11 Q. In this link to justice.gov, is that where you found out
12 about the news of Mr. Parker's settlement?

13 A. I can't recall exactly how I found out about the news.

14 MR. FREEMAN: Plaintiff would like to mark Plaintiff's
15 Exhibit 76. Your Honor, may I have the court's permission to
16 approach the witness?

17 THE COURT: Yes.

18 (Pause)

19 BY MR. FREEMAN:

20 Q. Mr. Hayes, do you recognize this document?

21 A. Yes.

22 Q. This is an email from you to Ms. Fisher?

23 A. Yes.

24 Q. Which is one minute after the prior email we just
25 discussed?

I8DJMAN1

Hayes - direct

1 A. Yes.

2 MR. FREEMAN: Plaintiff respectfully moves the court
3 for admission of Plaintiff's Exhibit 76.

4 MS. LACKMAN: No objection.

5 (Plaintiff's Exhibit 76 received in evidence)

6 BY MR. FREEMAN:

7 Q. Here you write, "Also if you guys have a picture of Raymond
8 you can share, please send."

9 Do you see that?

10 A. Yes.

11 Q. So you wanted to obtain a photograph of Raymond Parker for
12 your article, correct?

13 A. Yes.

14 Q. And you wanted to obtain that photograph for free?

15 A. I wanted to obtain a photograph for the article.

16 Q. That doesn't quite answer the question. Let me ask again.

17 When you asked Ms. Fisher if she could share a picture
18 of Mr. Parker, was it your intent to license the photograph
19 from Ms. Fisher?

20 A. Ms. Fisher never mentioned licensing a photo to me. Had
21 she mentioned it, I would have considered it at the time.

22 Q. But not in response to any email that Ms. Fisher sent to
23 you regarding the photograph, correct?

24 A. This email appears to be me mentioning interest in a
25 photograph.

I8DJMAN1

Hayes - direct

1 Q. Before you asked Ms. Fisher to share a photograph of Mr.
2 Parker, did you check Getty Images or some other stock photo
3 agency to see whether a photo of Mr. Parker was available for
4 license?

5 A. I don't recall.

6 Q. As of 11:18 am on April 11th, the time of this email, had
7 you already seen the New York Post article, dated January 18th,
8 2017?

9 A. I don't recall when I saw the article.

10 Q. In response to this email, did Ms. Fisher send you a
11 photograph of Mr. Parker?

12 A. No.

13 Q. Have you ever seen an email where Ms. Fisher sent you a
14 photograph of Mr. Parker?

15 A. No.

16 MR. FREEMAN: At this time plaintiff would like to
17 mark Plaintiff's Exhibit 77. Your Honor, may I have the
18 court's permission to approach the witness?

19 THE COURT: Yes.

20 (Pause)

21 (Plaintiff's Exhibit 77 received in evidence)

22 BY MR. FREEMAN:

23 Q. Mr. Hayes, do you recognize this document?

24 A. Yes.

25 Q. Is it accurate to describe this as a screen-shot of

I8DJMAN1

Hayes - direct

1 meta-data associated with the photograph of Raymond Parker?

2 A. I'm not sure if -- I am not an expert on meta-data. I can
3 explain to you how I obtained this information.

4 Q. Yes, please.

5 A. Well, I don't remember the exact steps, but there are ways
6 to research the source of photo content that is contained on
7 the computer, and that is what this is.

8 Q. I see. Would it be accurate to state that if you download
9 a photograph onto your computer desktop and then you right
10 click "get info," that the next step is it would produce this
11 screen-shot?

12 A. That's possible that that's how you obtain this.

13 This was a long time ago I did this so I don't recall
14 exactly how.

15 Q. But it is accurate to state that this document was created
16 by information obtained from the photograph itself?

17 A. I'm not sure I understand the question.

18 This document was created by information that I was
19 able to find on my computer when I was looking into the source
20 of this photo.

21 Q. Did you need the photograph to produce this document?

22 A. Yes. This is information on the photo.

23 Q. So you created this document, correct?

24 A. It appears to be an exhibit created by you, but, yeah, I
25 created the screen-shot contained here.

I8DJMAN1

Hayes - direct

1 Q. Thank you.

2 MR. FREEMAN: Plaintiff respectfully moves the court
3 to admit Plaintiff's Exhibit 77 into evidence.

4 MS. LACKMAN: No objection.

5 (Plaintiff's Exhibit 77 received in evidence)

6 BY MR. FREEMAN:

7 Q. Under the section here labeled "more info," do you see
8 that?

9 A. Yes.

10 Q. There is a line that says, "where from." Do you see that?

11 A. Yes.

12 Q. Then it lists a URL associated with the New York Post,
13 correct?

14 A. Yes.

15 Q. Does this mean you downloaded this photograph from the New
16 York Post web site?

17 A. Yes.

18 Q. On next labeled "General," do you see that in the top?

19 A. Yes.

20 Q. It says, "Created Tuesday, April 11th, 2017, at 11:48 am."
21 Is that correct?

22 A. Yes.

23 Q. Does this mean you downloaded the photograph of Mr. Parker
24 from the New York Post at 11:48 am Eastern Standard Time on
25 April 11th?

I8DJMAN1

Hayes - direct

1 A. I'm not sure exactly what this created field is in
2 reference to.

3 MR. FREEMAN: I would like to mark Plaintiff's Exhibit
4 20. Your Honor, may I have the court's permission to approach
5 the witness with the document?

6 THE COURT: Yes.

7 (Pause)

8 BY MR. FREEMAN:

9 Q. Do you recognize this document, Mr. Hayes?

10 A. Yes.

11 Q. Is it a news article published by Buzzfeed on April 11th,
12 2017, at 12:14 pm?

13 A. Yes.

14 Q. Is that approximately 26 minutes after you downloaded the
15 photograph from the New York Post?

16 A. It is approximately 26 minutes after the time that's listed
17 under the created field in the photo information.

18 Q. Thank you.

19 You wrote this article in your capacity as senior
20 editor of Buzzfeed, correct?

21 A. Buzzfeed news reporter.

22 MR. FREEMAN: Plaintiff respectfully moves the court
23 for admission of Plaintiff's Exhibit 20.

24 MS. LACKMAN: No objection.

25 (Plaintiff's Exhibit 20 received in evidence)

I8DJMAN1

Hayes - direct

1 BY MR. FREEMAN:

2 Q. So under the headline there is a photograph of Raymond
3 Parker, correct?

4 A. Yes.

5 Q. And underneath the photograph of Mr. Parker to the left, is
6 that a gutter credit?

7 A. Yes, there is photo credit listed under the photo.

8 Q. Does the first line in bold face describe the subject
9 matter of the photograph, which is Raymond Parker?

10 MS. LACKMAN: Objection, just to the extent it
11 mischaracterizes the exhibit. It may be an edited version.

12 BY MR. FREEMAN:

13 Q. So the first line underneath the photograph of Mr. Parker
14 describes the subject matter of the photograph?

15 A. Yes.

16 Q. The second line identifies Fisher Taubenfeld. Do you see
17 that?

18 A. Yes.

19 Q. Who is Fisher Taubenfeld?

20 A. It is a law firm.

21 Q. So Fisher Taubenfeld is not the name of the photographer?

22 A. It is the name of the law firm that gave me access to this
23 photo.

24 Q. Gregory Mango is the name of the photographer of this
25 photograph, correct?

I8DJMAN1

Hayes - direct

1 MS. LACKMAN: Objection; foundation.

2 THE COURT: Overruled.

3 A. At the time this photo was given to me, I was informed that
4 it belonged to Fisher Taubenfeld.

5 BY MR. FREEMAN:

6 Q. This photograph was given to you?

7 A. I was given access to use this photo, as I just said.

8 Q. Didn't you download this photograph from the New York Post
9 yourself?

10 A. Yes.

11 Q. Why didn't you use the name of the photographer, Mr. Mango,
12 in the gutter head?

13 A. At the time I published this article, I was not informed
14 that Mr. Mango was the photographer.

15 Q. Before publishing this article about Mr. Parker, have you
16 ever credited a photograph to a law firm or an attorney?

17 A. Yes.

18 Q. Why would you credit a law firm or an attorney?

19 A. Because that law firm or that attorney was the person who
20 gave me access to the photo.

21 Q. I see. Have you been trained in Buzzfeed that a law firm
22 or an attorney owns the rights to a photograph of the clients
23 they represent?

24 MS. LACKMAN: There is privilege here. You can ask
25 was it in his knowledge, but conversations with attorneys

I8DJMAN1

Hayes - direct

1 are --

2 THE COURT: Rephrase the question, Mr. Freeman.

3 MR. FREEMAN: Yes.

4 BY MR. FREEMAN:

5 Q. At Buzzfeed, you testified that you've been provided
6 training by the legal department as to how to credit
7 photographers for their work.

8 The question is, as part of your training, did you
9 learn that a law firm or an attorney owns the rights to a
10 photograph of the clients they represent?

11 A. As part of our training, we learn to credit the source of
12 photos, and it has been my experience that law firms and
13 attorneys can be the source of photos.

14 Q. Doesn't the photographer own the rights to the photograph?

15 MS. LACKMAN: Objection. He is not a lawyer.

16 THE COURT: Overruled.

17 A. Can you repeat the question.

18 BY MR. FREEMAN:

19 Q. Sure. Doesn't the photographer own the rights to the
20 photograph?

21 A. It is my understanding again that a law firm or an attorney
22 can own or have access to a photo and be able to share photos
23 with journalists.

24 Q. Have you ever received a press kit from a lawyer containing
25 a photograph of the lawyer's client?

I8DJMAN1

Hayes - direct

1 A. I can't recall receiving a press kit.

2 Q. So it is not common practice for you to receive press kits
3 from attorneys?

4 A. I'm not sure I understand the question.

5 Q. During the course of this litigation, did anyone from
6 Buzzfeed ask you to go through your files and produce any
7 copies of press kits that you received from attorneys?

8 A. No.

9 Q. Did you receive a press kit from Ms. Liane Fisher
10 concerning Raymond Parker?

11 A. I don't recall receiving a press kit.

12 Q. Did you receive a press release from Ms. Liane Fisher
13 concerning the settlement of Mr. Parker's case?

14 A. I don't recall.

15 MR. FREEMAN: Your Honor I would like to identify
16 Plaintiff's Exhibit 78. Your Honor, may I have the court's
17 permission to approach the witness?

18 THE COURT: Yes.

19 (Pause)

20 BY MR. FREEMAN:

21 Q. Do you recognize this document, Mr. Hayes?

22 A. Yes.

23 Q. This is an email from you to Ms. Fisher?

24 A. Yes.

25 MR. FREEMAN: Plaintiff respectfully moves the court

I8DJMAN1

Hayes - direct

1 for admission of Plaintiff's Exhibit 78.

2 MS. LACKMAN: No objection.

3 (Plaintiff's Exhibit 78 received in evidence)

4 BY MR. FREEMAN:

5 Q. Mr. Hayes, so you sent Ms. Fisher a link to the Buzzfeed
6 article at 12:24 pm?

7 A. Yes.

8 MR. FREEMAN: I would like to mark as Plaintiff's
9 Exhibit 79. Your Honor, may I have the court's permission to
10 approach the witness?

11 THE COURT: Yes

12 (Pause)

13 BY MR. FREEMAN:

14 Q. Do you recognize this document?

15 A. Yes.

16 Q. This is email from Ms. Fisher to you?

17 A. Yes.

18 MR. FREEMAN: Plaintiff respectfully moves the court
19 for admission of Plaintiff's Exhibit 79.

20 MS. LACKMAN: Subject to the same comment we had about
21 Exhibit 74, namely, her testimony, we have no objection.

22 (Plaintiff's Exhibit 79 received in evidence)

23 MR. FREEMAN: Plaintiff marks for identification
24 Plaintiff's Exhibit 18. Your Honor, may I have the court's
25 permission to approach the witness?

I8DJMAN1

Hayes - direct

1 THE COURT: Yes.

2 (Pause)

3 BY MR. FREEMAN:

4 Q. Mr. Hayes, do you recognize this document?

5 A. No.

6 Q. Would it be accurate to describe this document as a Daily
7 News article about Mr. Parker's settlement, dated April 11, at
8 1:46 pm?

9 MS. LACKMAN: Objection. He said --

10 THE COURT: Sustained. Sustained.

11 MR. FREEMAN: Plaintiff marks for identification
12 Plaintiff's Exhibit 17. Your Honor, may I have permission to
13 approach the witness?

14 THE COURT: Yes.

15 (Pause)

16 BY MR. FREEMAN:

17 Q. Mr. Hayes, do you recognize this document?

18 A. No.

19 MR. FREEMAN: We will withdraw.

20 (Continued on next page)

21

22

23

24

25

18DAAMAN2

Hayes - Direct

1 BY MR. FREEMAN:

2 Q. Mr. Hayes, when did you learn there was a copyright
3 infringement suit involving your article about Mr. Parker?

4 A. I don't recall the exact date. I believe it was five, six
5 months after the article was published.

6 Q. And do you recall who informed you of the infringement
7 lawsuit?

8 A. A member of BuzzFeed's legal team.

9 Q. Was it Ms. Yaqubi?

10 A. Possibly.

11 Q. Was it Mr. Brehm, Mr. Gregory Brehm?

12 A. Possibly.

13 Q. And were you provided any specific instructions at that
14 time?

15 A. I don't recall specifically what instructions I was
16 provided.

17 Q. So after this lawsuit was filed, did BuzzFeed provide you
18 any further training about how to credit photographers for
19 their work?

20 A. I don't recall the last time I had a photo training at
21 BuzzFeed. It was probably sometime within the last year.

22 Q. And so was there any discussion as to whether you needed to
23 obtain written licensing agreements from photographers to
24 publish their work?

25 MS. LACKMAN: Objection. Foundation.

18DAAMAN2

Hayes - Direct

1 THE COURT: Sustained.

2 MR. FREEMAN: Plaintiff would like to mark Plaintiff's
3 Exhibit 81.

4 Your Honor, may I have the Court's permission to
5 approach the witness?

6 THE COURT: Yes.

7 (Pause)

8 Q. Mr. Hayes, do you recognize this document?

9 A. Yes.

10 Q. This is an e-mail from you to Ms. Fisher dated September
11 12th of 2017.

12 A. September 13th.

13 Q. I am sorry. September 13. Is that correct?

14 A. Yes.

15 MR. FREEMAN: Plaintiff respectfully moves the Court
16 for admission of Plaintiff's Exhibit 81.

17 MS. LACKMAN: No objection.

18 Q. Was this an e-mail that you sent to Ms. Fisher under the
19 instructions of the legal department at BuzzFeed?

20 A. I don't recall if I was instructed to or upon learning
21 about this litigation I decided to reach out myself.

22 Q. I see. And in the third line, the third paragraph there
23 you say: "It's my recollection that your firm provided this
24 photo to us, but I can't seem to find the e-mail in my in-box."

25 A. Yes.

18DAAMAN2

Hayes - Cross

1 Q. So how did you recall that Ms. Fisher provided you the
2 photo of Raymond Parker when you already knew that you had
3 downloaded it from The New York Post?

4 MS. LACKMAN: Objection.

5 THE COURT: Overruled.

6 A. At the time I had sent this e-mail, which was roughly four
7 months after the publishing of the article, my initial
8 recollection was that Ms. Fisher had e-mailed me the photo.

9 Q. And you later determined that inn fact she had not sent you
10 the e-mail of the photograph, correct?

11 A. Yes.

12 MR. FREEMAN: Thank you, Mr. Hayes. There are no
13 further questions.

14 THE COURT: All right. Ms. Lackman.

15 CROSS-EXAMINATION

16 BY MS. LACKMAN:

17 Q. Mr. Hayes, I have a few questions for you.

18 Earlier we were talking about, Mr. Freeman was talking
19 with you about The New York Post article from January 2017.

20 Do you recall that?

21 A. Yes.

22 Q. Do you recall, did Ms. Fisher mention that New York Post
23 article to you when you spoke?

24 A. I don't believe she did.

25 Q. Do you recall what -- did she say anything during the call

18DAAMAN2

Hayes - Cross

1 regarding the photograph of Mr. Parker at issue in this case?

2 A. Yes. She advised me to use the photograph that The New
3 York Post used in the article about Mr. Parker.

4 Q. And in your experience have other attorneys provided or
5 provided this type of permission to use a photograph of their
6 clients?

7 A. Yes.

8 Q. So when Mr. Freeman was asking you about press kits, for
9 example, you weren't talking about a certain situation where an
10 attorney might provide you as the press with some authority or
11 information?

12 A. I'm still unclear what he meant by press kit. I don't
13 receive press kits typical from attorneys. I receive press
14 releases, photos, case exhibits, that sort of thing.

15 Q. Did you send the article to Ms. Fisher for -- did you send
16 the article to Ms. Fisher when it was completed?

17 A. Yes.

18 Q. And she responded to you?

19 A. Yes.

20 Q. Did she object to the use of the photograph at any time?

21 A. No.

22 Q. Did she object to the credit that was used in the article?

23 A. No.

24 Q. Can we go back to the exhibit -- I think you have it in
25 front of you -- Exhibit 77.

18DAAMAN2

Hayes - Cross

1 A. Got it.

2 Q. And that was the metadata that we were talking about,
3 right?

4 A. Yes.

5 Q. OK. Do you see Mr. Mango's name anywhere in this metadata?

6 A. No.

7 Q. Did you remove any metadata when you downloaded the
8 photograph?

9 A. I have no idea how to remove metadata from photographs.

10 Q. OK. When you downloaded the photograph, did it take just
11 the image or did the credit come with it?

12 A. I believe it took just the image.

13 MS. LACKMAN: Just checking to see if I have any
14 further questions.

15 (Pause)

16 Q. Actually, let's look at -- I'd like to draw your attention
17 to an exhibit that is in the plaintiff's binder but also, I
18 believe, in ours.

19 MS. LACKMAN: I'd like to mark for identification
20 Plaintiff's Exhibit A.

21 We've put everything in the binder for the witness
22 that's sitting there, if that's all right.

23 THE COURT: Yes.

24 Q. Mr. Hayes, I am showing you what's been previously marked
25 Exhibit A.

18DAAMAN2

Hayes - Cross

1 Do you recognize this e-mail chain?

2 A. Yes.

3 MS. LACKMAN: I'd like to move for the admission of
4 the e-mail chain into evidence.

5 THE COURT: Is there any objection to any of the
6 exhibits in the defendant's binder?

7 MR. FREEMAN: No, your Honor.

8 THE COURT: All right. Then just proceed with each
9 exhibit, Ms. Lackman, without needing to produce it
10 individually.

11 MS. LACKMAN: Sure. It's a long chain. So we'll
12 proceed.

13 Q. If you turn to -- I apologize. This was in this case twice
14 and so I'm using different version.

15 If you turn almost three-quarters of the way in,
16 you'll start seeing Bates numbers on bottom that start with
17 DEF.

18 We'll have to compliment Mr. Freeman on his marking of
19 exhibit. In this way it makes a little more sense. I
20 apologize for the confusion. But if you could turn to where it
21 starts at DEF 00050.

22 Do you see that?

23 A. Yes.

24 Q. I'll ask you some questions pertaining to this chain. Can
25 you briefly describe what's happening in the e-mail chain that

18DAAMAN2

Hayes - Cross

1 starts at Defendant 00050?

2 A. The first e-mail is an e-mail from myself to Liane Fisher.

3 Q. OK. If you turn to the next page, at the top there's an
4 e-mail dated September 21, 2017 at 12:11.

5 Do you see that?

6 A. Yes.

7 Q. Do you recall seeing this e-mail message?

8 A. Yes.

9 Q. And do you see the message "I will forward to you the
10 e-mail when I'm in the office tomorrow?"

11 A. Yes.

12 Q. When you saw that, what was your impression regarding what
13 had transpired regarding your obtaining the photo?

14 A. My impression was that Ms. Fisher had searched her e-mail
15 inbox and found an e-mail where she sent me a photo of
16 Mr. Parker.

17 Q. If she had sent the photo to you, why wouldn't you have had
18 it in your files?

19 A. At the time I would regularly purge my inbox of large
20 e-mails, e-mails that contain attachments, in order to conserve
21 server space in our e-mail system.

22 Q. OK. Thank you.

23 My last question is, do you have any understanding as
24 to why Ms. Yaqubi was involved in this e-mail chain?

25 A. I believe Ms. Yaqubi initially reached out to Ms. Fisher or

18DAAMAN2

Hayes - Cross

1 reached out to Ms. Fisher during this time because I was on
2 leave, on paternity leave at the time that this was
3 transpiring.

4 Q. And then just to clarify something we were talking about
5 earlier about credits. So when you provide credit to the
6 source, what does that mean to you?

7 A. In the context of a photo?

8 Q. Yes. Thank you.

9 A. It means that I am crediting the source or owner of the
10 photo as I understand it to be.

11 Q. And with reference to earlier, there was discussion about
12 sharing the photo.

13 Do you recall that?

14 A. Yes.

15 Q. About you asking Ms. Fisher if she could share the photo.

16 A. Yes.

17 Q. And you and Ms. Fisher didn't discuss licensing?

18 A. No.

19 Q. Do you have any understanding of what licensing means?

20 A. I believe that licensing refers to the process of sharing a
21 photo with somebody or -- let me rephrase. The term licensing
22 means sharing content with somebody.

23 Q. So can you have permission to use a photo without licensing
24 it?

25 A. I believe that you can get permission to use a photo from

18DAAMAN2

Hayes - Cross

1 the source or owner of a photo.

2 Q. Without engaging in licensing discussions?

3 A. Yes.

4 Q. Actually, one other question. I apologize.

5 The photograph of Mr. Parker -- and you can feel free
6 to look at it if you like. It's one of the exhibits that was
7 shown to you. If you want to look at the photograph either in
8 your article or in The New York Post article.

9 Do you have any reason to believe that this photo was
10 taken by a professional photographer?

11 A. It appears that it could have been taken by a photographer.
12 It also appears that it could have been taken by somebody using
13 a control phone.

14 Q. Did you have any reason to believe when you saw this
15 photograph that it was something that came from Ms. Fisher's
16 firm?

17 A. No.

18 Q. And, to your knowledge, has BuzzFeed ever been sued for any
19 photograph in any of the articles that you've written over the
20 years?

21 A. No.

22 Q. And do you have any rough estimate of how many articles
23 you've written over the years for BuzzFeed?

24 A. Over a thousand.

25 MS. LACKMAN: Thank you.

18DAAMAN2

Hayes - Redirect

1 I have no further questions.

2 THE COURT: Mr. Freeman.

3 MR. FREEMAN: Your Honor, may I ask a few more
4 questions?

5 THE COURT: Yes.

6 REDIRECT EXAMINATION

7 BY MR. FREEMAN:

8 Q. Mr. Hayes, you just testified that Ms. Fisher and you
9 engaged in a telephone conversation, is that correct?

10 A. Yes.

11 Q. And did that telephone conversation take place after you
12 e-mailed Ms. Fisher and asked her to share a photograph?

13 A. I don't recall exactly when the phone conversation
14 happened.

15 Q. OK. Would you kindly take a look back at an exhibit marked
16 74. It's an e-mail from Ms. Fisher to you.

17 Do you see it?

18 A. Um-hmm.

19 Q. In the Ms. Fisher e-mail you said: "I'd be happy to
20 comment on the matter. I'll call you within the hour."

21 Do you see that?

22 A. Yes.

23 Q. The time stamp on the e-mail is 11:16 a.m.?

24 A. Yes.

25 Q. Can you please turn to Plaintiff's Exhibit 75. I'm sorry.

18DAAMAN2

Hayes - Redirect

1 Please turn to 76. This is the e-mail from you to Liane Fisher
2 timestamped 11:18 a.m.?

3 A. Yes.

4 Q. Is this where you asked Ms. Fisher if she can share a
5 picture of Raymond?

6 A. Yes.

7 Q. Does this reflect your recollection that the telephone
8 conversation that you had with Ms. Fisher took place after you
9 sent this e-mail?

10 A. I would be willing to guess that, yes, it took place after
11 considering that it's roughly two minutes after she said she
12 was going to call me.

13 Q. OK. And you earlier testified that Ms. Fisher never
14 actually sent you a photograph of Mr. Parker, correct?

15 A. Yes.

16 Q. So I just want to get this straight. So you e-mailed her
17 at 11:18 a.m. and asked for a picture. She didn't send it to
18 you. And then you went to The New York Post, downloaded it,
19 and then you had a conversation with Ms. Fisher?

20 A. No.

21 Q. So do you know, did you have the conversation with
22 Ms. Fisher before or after you downloaded the photograph from
23 to The New York Post?

24 A. Before.

25 Q. You had the conversation with Ms. Fisher before you

18DAAMAN2

Hayes - Redirect

1 downloaded it.

2 So is it your testimony that you asked Ms. Fisher
3 whether you were authorized to publish a photograph you
4 obtained from The New York Post?

5 MS. LACKMAN: Objection.

6 THE COURT: Overruled.

7 A. It's my recollection that I asked Ms. Fisher on the phone
8 if she could provide me with a photograph and she advised me to
9 use the one from The New York Post.

10 Q. Is it your custom to publish photographs on BuzzFeed's
11 website on the basis of oral representations versus a written
12 licensing agreement?

13 A. As I already said, we have multiple ways we do it.

14 Q. So would your answer be that you do customarily rely on
15 oral licensing agreements?

16 Let me rephrase that.

17 Is it your testimony that you customarily rely on oral
18 permission to publish a photograph on BuzzFeed's website?

19 A. I don't customarily rely on any specific process. We have
20 multiple processes.

21 MR. FREEMAN: Thank you. No further questions.

22 Your Honor, I would like to -- I'm done with
23 questioning. I'm not sure if Ms. Lackman is.

24 THE COURT: Mr. Hayes, I'd like to ask a couple of
25 questions to clarify your testimony.

18DAAMAN2

Hayes - Redirect

1 If I understood what you testified correctly, you
2 wanted a photo of Mr. Parker. You asked Ms. Fisher if she
3 could provide one. Then is it your testimony that she advised
4 you that there was a photograph of Mr. Parker in The New York
5 Post?

6 THE WITNESS: Yes.

7 THE COURT: Did she give you direction as to how to
8 find it or did she just say there is a photograph in The New
9 York Post article?

10 THE WITNESS: I don't recall exactly what she said,
11 but she advised me of The New York Post photo.

12 THE COURT: But the point is that the first that you
13 heard about the existence of the photo of Mr. Parker was when
14 Ms. Fisher brought it to your attention.

15 THE WITNESS: Yes.

16 THE COURT: And then in Exhibit 77 you went to The New
17 York Post site and you created this photograph that's dated
18 11:48 a.m., is that correct?

19 THE WITNESS: Yes.

20 THE COURT: Your testimony is that the photograph that
21 you used was the one that's in Exhibit No. 77?

22 THE WITNESS: Yes.

23 THE COURT: It did not have the attribution?

24 THE WITNESS: No, it did not.

25 THE COURT: But when you published your story in

18DAAMAN2

Hayes - Redirect

1 Exhibit No. 20, there is a photograph of Mr. Parker and it has
2 the attribution to Fisher & Taubenfeld.

3 THE WITNESS: Yes.

4 THE COURT: So in other words, you had a photograph
5 from The New York Post that did not have a title or
6 attribution, but then when you created the photo for the story,
7 you added the title and the attribution, is that correct?

8 THE WITNESS: Yes.

9 THE COURT: Why did you decide to place Fisher &
10 Taubenfeld? When did you decide to do that?

11 THE WITNESS: It was my understanding that this photo
12 belonged to Ms. Fisher. So I was crediting her law firm.

13 THE COURT: But what gave you the understanding that
14 it was the photograph belonging to the firm?

15 THE WITNESS: I asked her to provide me with a
16 photograph and this was the photo that she advised me to use.

17 THE COURT: Well, she advised you to use a photograph
18 in The New York Post.

19 THE WITNESS: She advised me to use a photograph that
20 was included in an article on newyorkpost.com, yes.

21 THE COURT: And when you received photographs -- have
22 you ever encountered a situation before in which you have
23 obtained a picture that did not have attributions of a
24 photographer?

25 THE WITNESS: I'm not sure I understand the question.

18DAAMAN2

Hayes - Redirect

1 THE COURT: Have you ever been in a situation where
2 you have needed to use a photograph and you obtained one that
3 did not have the attribution to the photographer?

4 THE WITNESS: I have, yes.

5 THE COURT: And what do you normally do in those
6 cases?

7 THE WITNESS: Credit the source of the photo.

8 THE COURT: And you determined the source to be
9 whoever directed you to find the photograph or who gave it to
10 you?

11 THE WITNESS: If they're a credible source, yes.

12 THE COURT: All right. Thank you.

13 MR. FREEMAN: No further questions for Mr. Hayes, your
14 Honor.

15 THE COURT: You may step down.

16 (Witness excused)

17 THE COURT: Do you have a next witness?

18 MR. FREEMAN: Yes. Plaintiff would like to call
19 Ms. Liane Fisher to the stand.

20 THE COURT: How long do you think you'll need with the
21 witness?

22 MR. FREEMAN: This will be very brief. I will say no
23 more than ten minutes.

24 LIANE FISHER,

25 called as a witness by the Plaintiff,

18DAAMAN2

Fisher - Direct

1 having been duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. FREEMAN:

4 Q. Thank you for appearing today, Ms. Fisher.

5 What is your occupation?

6 A. I'm an attorney.

7 Q. And how long have you been admitted to practice?

8 A. Since 2006. So 12 years.

9 Q. And do you specialize in any area of law?

10 A. Employment law.

11 Q. Have you litigated any copyright cases?

12 A. No.

13 Q. During the course of your legal career have you ever sent
14 out a press release announcing a settlement that you've
15 obtained on behalf of a client?

16 A. No.

17 Q. Have you ever prepared a press kit containing photographs
18 of your client?

19 A. No.

20 Q. Is it your custom and practice to maintain photographs of
21 the clients that you represent?

22 A. No.

23 Q. Have you ever sent a photograph of one of your clients to
24 press?

25 A. No.

18DAAMAN2

Fisher - Direct

1 Q. Who is Raymond Parker?

2 A. He is a former client of mine.

3 Q. On April 10 of 2017, did you obtain a settlement on
4 Mr. Parker's behalf?

5 A. Yes.

6 Q. Did your law firm send out a press release announcing the
7 settlement?

8 A. No.

9 Q. At the time you settled the lawsuit, did you possess a
10 photograph of Mr. Parker on your computer or other digital
11 device?

12 A. No.

13 Q. Did you possess a photograph of Mr. Parker in hard copy?

14 A. No.

15 Q. On June 21, 2018, do you recall responding to a subpoena to
16 produce documents in connection with this litigation?

17 A. On or about that date, yes.

18 Q. And did you produce all documents in your possession
19 concerning your e-mail communications with BuzzFeed?

20 A. Yes.

21 MR. FREEMAN: I'd like to mark Plaintiff's Exhibit 73.
22 Actually, this is already in evidence. But, your Honor, may
23 I --

24 THE COURT: Yes.

25 MR. FREEMAN: -- approach the witness?

18DAAMAN2

Fisher - Direct

1 (Pause)

2 Q. Ms. Fisher, do you recognize this document?

3 A. I do.

4 Q. This is an e-mail from Michael Hayes?

5 A. Yes.

6 Q. And prior to receiving this e-mail had you known Michael
7 Hayes?

8 A. No.

9 Q. So Mr. Hayes was asking you to comment on Mr. Parker's
10 settlement?

11 A. Yes.

12 MR. FREEMAN: Plaintiff respectfully refers the Court
13 to Plaintiff's Exhibit 74, which is already marked into
14 evidence.

15 May I approach the witness, your Honor?

16 THE COURT: Yes.

17 (Pause)

18 Q. Ms. Fisher, do you recognize this document?

19 A. Yes.

20 Q. This is your response to Mr. Hayes's e-mail indicating that
21 you would be happy to comment on Mr. Parker's case?

22 A. Correct.

23 MR. FREEMAN: Plaintiff respectfully refers the Court
24 to Plaintiff's Exhibit 75, which is already marked in evidence.

25 Your Honor, may I approach the witness?

18DAAMAN2

Fisher - Direct

1 THE COURT: Yes.

2 (Pause)

3 Q. Ms. Fisher, do you recognize this document?

4 A. I do.

5 Q. And this is Mr. Hayes's response where he says, quote, the
6 sooner the better?

7 A. Yes.

8 Q. Was it your impression upon reading this that Mr. Hayes was
9 in a rush to talk to you?

10 A. From reading this, yes.

11 MR. FREEMAN: Plaintiff respectfully refers the Court
12 to Plaintiff's Exhibit 76, which is already marked in evidence.

13 Your Honor, may I approach the witness?

14 THE COURT: Yes.

15 (Pause)

16 Q. Ms. Fisher, do you recognize this document?

17 A. I do.

18 Q. So one minute after Mr. Hayes writes "the sooner the
19 better," he asks you to, quote-unquote, share a photograph of
20 Mr. Parker.

21 Do you see that?

22 A. I do.

23 Q. Do you remember receiving this e-mail?

24 A. Honestly, I only remember it because I reviewed all my
25 e-mails since this case was brought to my attention.

18DAAMAN2

Fisher - Direct

1 Q. And in response to this did you e-mail a photograph of
2 Mr. Parker to Mr. Hayes?

3 A. I did not.

4 Q. And did you send a photograph to Mr. Hayes by hand via
5 courier?

6 A. I did not.

7 Q. At some point on April 11, 2017 did have you a telephone
8 conversation with Mr. Hayes?

9 A. I believe so.

10 Q. During the telephone call did Mr. Hayes ask you again to
11 e-mail him a photograph of Mr. Parker?

12 A. I don't recall.

13 Q. Did he ask you for authorization to publish a photograph of
14 Mr. Parker?

15 A. I don't recall.

16 Q. Did he notify you that he had already retrieved a
17 photograph of Mr. Parker from The New York Post?

18 A. I don't believe so.

19 Q. Did he say anything at all about a photograph of
20 Mr. Parker?

21 A. I don't remember.

22 Q. Let me ask you this. Had you seen a --

23 MR. FREEMAN: Well, actually, let me refer the Court
24 to Plaintiff's Exhibit 13.

25 Your Honor, may I have the Court's permission to

18DAAMAN2

Fisher - Direct

1 approach the witness?

2 THE COURT: Yes.

3 (Pause)

4 Q. Ms. Fisher, do you recognize this document?

5 A. I do.

6 Q. And prior to speaking to Mr. Hayes by telephone on
7 April 11, 2017, had you seen this New York Post article?

8 A. Yes.

9 Q. And during your telephone conversation with Mr. Hayes, did
10 you direct him to obtain a photograph of Mr. Parker from The
11 New York Post?

12 A. I don't remember, but I don't believe so.

13 Q. OK.

14 MR. FREEMAN: Plaintiff respectfully refers the Court
15 to Plaintiff's Exhibit 76, which was already marked into
16 evidence.

17 Your Honor, may I approach the witness?

18 THE COURT: Yes.

19 (Pause)

20 Q. Ms. Fisher, do you recognize this document?

21 A. I do.

22 Q. This is the e-mail from Mike Hayes to you at 12:24 p.m.?

23 A. No. It's marked -- the timestamp is 11:18.

24 Q. Wait.

25 A. I have 76 twice now.

18DAAMAN2

Fisher - Direct

1 Q. I'm sorry.

2 (Pause)

3 MR. FREEMAN: May I approach the witness, your Honor?

4 THE COURT: Yes.

5 (Pause)

6 Q. Ms. Fisher, do you recognize this document?

7 A. I do.

8 Q. This is the e-mail from Mike Hayes to you at 12:24 p.m.?

9 A. Yes.

10 Q. And is this a link to an article published on BuzzFeed's
11 website about Raymond Parker?

12 A. It is.

13 MR. FREEMAN: Plaintiff respectfully refers the Court
14 to Plaintiff's Exhibit 20.

15 Your Honor, may I approach the witness?

16 THE COURT: Yes.

17 (Pause)

18 Q. Ms. Fisher, do you recognize this document?

19 A. I do.

20 Q. Is this the news article that's published by BuzzFeed
21 concerning Raymond Parker's settlement?

22 A. Yes.

23 Q. Underneath the photograph of Mr. Parker the second line
24 identifies your law firm, Fisher & Taubenfeld.

25 Do you see that?

18DAAMAN2

Fisher - Cross

1 A. Yes.

2 Q. Back on April 11, 2017 when Mr. Hayes e-mailed you a link
3 to the BuzzFeed article, did you read this article?

4 A. I don't remember, but I would imagine that I did.

5 Q. And at the time did you see Fisher & Taubenfeld listed
6 underneath the photograph of Mr. Parker?

7 A. I don't remember.

8 Q. Had you seen it, would you have understood that to mean
9 that Fisher & Taubenfeld had legally authorized BuzzFeed to
10 publish the photograph of Mr. Parker?

11 MS. LACKMAN: Objection.

12 THE COURT: Sustained.

13 Rephrase the question.

14 Q. Had you seen the line Fisher & Taubenfeld underneath the
15 photograph, would you have understood to mean that Fisher &
16 Taubenfeld had legally authorized BuzzFeed to use the
17 photograph?

18 MS. LACKMAN: Same objection.

19 THE COURT: Overruled.

20 A. I don't think I would have understood the import of that
21 no.

22 MR. FREEMAN: Thank you.

23 No further questions, your Honor.

24 CROSS-EXAMINATION

25 BY MS. LACKMAN:

18DAAMAN2

Fisher - Cross

1 Q. Good morning, Ms. Fisher.

2 Do you recall BuzzFeed reaching out to you around
3 September 2017 regarding this photograph?

4 A. Yes.

5 Q. And at the time you thought you'd sent the photograph to
6 BuzzFeed, correct?

7 A. No, I did not.

8 Q. Why did you offer to check your e-mail if you had never
9 sent it to them?

10 A. I was in the middle of something at the time when I
11 received the e-mail, and this is my interpretation of what I
12 said in my e-mail, looking back retroactively.

13 So I received the e-mail. I was in the middle of
14 something. The manner in which the question was asked of can
15 you send me the picture seemed to indicate that I did, and then
16 I went back and I checked and I hadn't. I haven't ever sent a
17 picture to any reporter ever in my practice. But having
18 received the e-mail and having the language phrased in the way
19 it was, I thought that it was possible.

20 Q. And you were in the middle something and this was on -- and
21 if we need to look at e-mails, we can, if that helps you --
22 September 21st?

23 A. I would need to look at the e-mail.

24 Q. If you look at the binder that's in front of you, it's
25 within Exhibit A. If you turn, it's three pages from the end.

18DAAMAN2

Fisher - Cross

1 So the Bates number on the bottom is 51. It is all one long
2 e-mail chain. There are two long email chains, and this part
3 is one.

4 So at the top do you see the e-mail that starts with
5 "my apologies for the delay in responding?"

6 A. Yes.

7 Q. So the communications we were just talking about, this is
8 the communication that you sent where you said you were in the
9 middle of something?

10 A. Yes. I was on trial.

11 Q. OK. And then you went back -- you were in the office the
12 next day?

13 A. I can't recall.

14 Q. If you look down at page -- do you see an e-mail dated
15 September 22, 2017 at 1:36 p.m.?

16 A. Yes.

17 Q. You say, "Hi, Wajmah. I cannot locate the e-mail where I
18 forwarded you a picture of Mr. Parker."

19 Do you see that?

20 A. I see that.

21 Q. Why did you say I cannot locate the e-mail where I
22 forwarded you a picture of Mr. Parker if you had not thought
23 you forward a picture of Mr. Parker?

24 A. I'm sorry. Could you rephrase?

25 Q. Yeah.

18DAAMAN2

Fisher - Cross

1 Why would you say I cannot locate the e-mail where I
2 forwarded you a picture of Mr. Parker? Why would you say that?
3 Why didn't you say something like I didn't send you an e-mail?

4 A. I had no recollection, and if you read the rest of my
5 e-mail, it says: "I believe Mr. Parker may have himself
6 provided a picture. Do you think that's possible?"

7 Q. So you now believe based on this correspondence that you
8 did not send the photo?

9 A. I believe wholeheartedly that I did not send an e-mail with
10 a picture.

11 Q. Even though you searched your e-mails for it?

12 A. I'm sorry. Can you ask the question again?

13 Q. Do you believe wholeheartedly you didn't send it even
14 though at the time you searched your e-mails to try to find it?

15 A. Yeah. I mean, it was the manner in which the question was
16 asked of me, rather authoritatively, as though I had sent an
17 e-mail, so it left me questioning maybe I had sent an email
18 with a picture, which would never have been my practice, which
19 I have never done before. But I looked and then I confirmed
20 that I had not sent an e-mail with a picture.

21 Q. And you said "I believe Mr. Parker may have himself
22 provided the picture," correct?

23 A. "Is that possible," correct.

24 Q. You said you saw The New York Post article, right?

25 A. I did.

18DAAMAN2

Fisher - Cross

1 Q. You didn't tell Ms. Yaqubi that the photo came from the New
2 York Post?

3 A. No.

4 Q. And you didn't tell her that you had no permission to share
5 the photo with Mr. Hayes?

6 A. No, I definitely did.

7 Can you just ask the question again?

8 Q. Sure. You never told Ms. Yaqubi that you had no permission
9 to give for Mr. Hayes to use the photo?

10 A. I did not tell her that, no.

11 Q. When you saw the first New York Post article in January,
12 was your firm mentioned?

13 A. In the original New York Post article?

14 Q. Yes?

15 A. I don't believe so, no.

16 Q. Did that situation of an article being published without
17 your comment reflect a lost opportunity to give some
18 well-deserved publicity to the work you were doing on the case?

19 A. It was a decision that my firm made not to comment.

20 Q. Back in January?

21 A. Correct.

22 Q. When BuzzFeed contacted you in April, though, you did
23 comment?

24 A. Yes.

25 Q. Were you happy about the opportunity to get press coverage

18DAAMAN2

Fisher - Cross

1 for it?

2 A. Yes.

3 Q. And it was in your interest -- was it in your interest that
4 it would be helpful in order to increase the chance of your
5 firm being mentioned?

6 A. Yeah. Sure.

7 Q. So if you don't recall the specifics of the conversation
8 with Mr. Hayes, what is your recollection based on?

9 A. My recollection of what?

10 Q. Your recollection of your communications with Mr. Hayes in
11 April 2017.

12 A. I don't have a specific recollection of what we talked
13 about.

14 Q. When you indicated that you would get back to Mr. Hayes
15 within the hour when he first contacted you, do you have any
16 reason -- do you know whether you did get back to him within
17 the hour or relatively promptly?

18 A. I believe we spoke relatively soon to when I had sent that
19 e-mail. I don't know if it was exactly within the hour.

20 MS. LACKMAN: I have no further questions.

21 THE COURT: Mr. Freeman.

22 MR. FREEMAN: I have no further questions, your Honor.

23 THE COURT: Ms. Fisher, coming back to your telephone
24 discussion with Mr. Hayes on April 11th, how clear is your
25 recollection as to whether or not you specifically told him

18DAAMAN2

Fisher - Cross

1 that there was a photograph of Mr. Parker in The New York Post?

2 THE WITNESS: Your Honor, I really don't remember the
3 specifics of the conversation. I just can't imagine that I
4 talked to him or gave him permission to use a picture that I
5 myself had no authority to give permission for. But I really
6 don't remember.

7 THE COURT: The issue is not so much giving permission
8 but whether you alerted him that such a picture existed.

9 THE WITNESS: I don't remember, but I don't believe we
10 had that conversation.

11 THE COURT: Thank you.

12 MS. LACKMAN: Could I ask one more question?

13 THE COURT: Yes.

14 BY MS. LACKMAN:

15 Q. Ms. Fisher, have you ever taken a course in intellectual
16 property law?

17 A. I don't remember if I took it in law school.

18 Q. Have you ever practiced intellectual property law?

19 A. No.

20 Q. You are aware that there are logos of several bar
21 associations featured at the bottom of your website, correct?

22 A. Yes.

23 Q. Do you have permission to use logos of bar associations?

24 A. I don't know. I didn't create the website.

25 Q. Have you ever inquired as to whether permission should be

18DAAMAN2

Fisher - Cross

1 obtained to use a photo of bar associations on a website?

2 A. No.

3 MS. LACKMAN: No further questions.

4 THE COURT: All right. Thank you.

5 You are excused. You may step down.

6 THE WITNESS: Thank you, your Honor.

7 (Witness excused)

8 THE COURT: Mr. Freeman.

9 MR. FREEMAN: Yes. Are we going to proceed?

10 THE COURT: Why don't we take a ten-minute break.

11 MR. FREEMAN: Yes, your Honor. OK. Thank you.

12 (Recess)

13 THE COURT: Thank you.

14 All right, Mr. Freeman.

15 MR. FREEMAN: Plaintiff would like to call to the
16 witness stand Mr. Gregory Brehm.

17 THE COURT: Mr. Freeman, is Mr. Hayes still available?

18 MS. LACKMAN: We can call him back if the Court wants
19 him.

20 THE COURT: I think there was one question I omitted
21 to ask. So if we could re-call him immediately either in the
22 afternoon or tomorrow.

23 MS. LACKMAN: Sure. We can call him back.

24 THE COURT: All right. Thank you.

25 GREGORY BREHM,

18DAAMAN2

Brehm - Direct

1 called as a witness by the Plaintiff,

2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. FREEMAN:

5 Q. Mr. Brehm, thank you for appearing today.

6 What is your occupation?

7 A. Attorney.

8 Q. And where do you currently work?

9 A. BuzzFeed, Inc.

10 Q. What is your title?

11 A. Associate general counsel.

12 Q. How long have you been admitted to practice?

13 A. Since 1992, I believe I was sworn in.

14 Q. How long have you worked for BuzzFeed?

15 A. Since December 2014.

16 Q. And previous to joining BuzzFeed, can you describe your
17 experience in the area of copyright law.

18 A. Yeah. I started as an attorney -- sorry. My first law
19 firm in 1991. I was sworn in in probably January or February
20 of 1992. I practiced copyright law pretty much since the
21 beginning, from 1992 through I believe it was 2006 or 2007.

22 I took time off from the practice of law. I opened up
23 a company that made movies and short films where copyright law
24 was still a major portion of what I did. I came to BuzzFeed in
25 2014. And all during that time I have been involved in

18DAAMAN2

Brehm - Direct

1 copyright law.

2 Q. Is your experience primarily in transaction law or --

3 A. No. I was a litigator for 15 years.

4 Q. But in connection with your experience at the film company,
5 did you ever draft licensing agreements?

6 A. Yes, absolutely.

7 Q. For photographers as well as for audio visual clips?

8 A. For many things. I've drafted lots of license agreements
9 over time.

10 Q. Is part of your job as VP and associate general counsel at
11 BuzzFeed to provide training to news editors?

12 A. Yes. I provide the training and I oversee the training
13 program.

14 Q. And does this training consist of how to credit
15 photographers that are published on BuzzFeed's website?

16 THE WITNESS: Judge, I'm sorry. I don't feel
17 comfortable going into the details of the training that we
18 provide simply for attorney/client privileges issues.

19 THE COURT: I'm sorry. I am going to overrule that.
20 If you have a training program that's the policy of the
21 company, there's nothing privileged about that. It is just the
22 company policy, isn't it?

23 THE WITNESS: There is a training program, your Honor,
24 the specific advice I give to my --

25 THE COURT: I'm not talking about specific advice.

18DAAMAN2

Brehm - Direct

1 THE WITNESS: I have a training program, yes, and we
2 have policies, yes.

3 Q. Included in those policies is, let's say, a section on how
4 to credit photographs that are published on BuzzFeed's website?

5 A. Yes.

6 Q. Does this training also consist of how to license
7 photograph from photographers?

8 THE WITNESS: Your Honor, I don't how far I can go
9 without opening the door --

10 THE COURT: You can go that far.

11 A. Yes.

12 Q. And does BuzzFeed disseminate a training manual or employee
13 handbook that instructs news editors on matters pertaining to
14 copyright ownership?

15 A. There are written documents dealing with copyright use and
16 training that are disseminated to employees, yes.

17 Q. During the course of this litigation, did Ms. Lackman ask
18 you to produce those documents?

19 A. Not that I recall.

20 Q. Interesting.

21 What other measure does the legal department at
22 BuzzFeed take to ensure BuzzFeed's use of other people's
23 copyrighted works has been authorize?

24 A. I'm sorry. Could you repeat the question?

25 Q. Sure.

18DAAMAN2

Brehm - Direct

1 Aside from training manuals or internal memos or
2 employee handbooks, are there other measure in place at
3 BuzzFeed that are designed to ensure that BuzzFeed's use of
4 copyrighted materials have been authorized?

5 A. Yes.

6 Q. Does BuzzFeed maintain subscription agreements with stock
7 photo agencies, such as Getty Images?

8 A. Yes.

9 Q. And if a photograph is not available through a stock photo
10 agency, what procedures are in place for BuzzFeed to license
11 such photographs?

12 A. There are legions of procedures in place for someone to
13 license photographs.

14 Q. Does BuzzFeed employ its own staff of photographers?

15 A. Yes.

16 Q. Does BuzzFeed license photographs directly from freelance
17 photographers.

18 A. BuzzFeed hires freelance photographers under various
19 agreements.

20 Q. At BuzzFeed, is it customary for you to use written
21 licensing agreements with photographers?

22 A. Yes. Not to the exclusion of other agreements, but yes, we
23 do have written agreements with photographers.

24 Q. And does the legal department at BuzzFeed train its news
25 editors that it's permissible to obtain oral authorization from

18DAAMAN2

Brehm - Direct

1 third parties?

2 A. Under certain circumstances, yes.

3 Q. Who currently supervises your work at BuzzFeed?

4 A. Our general counsel stepped down on July 2. I report
5 directly to the CEO now.

6 Q. Do you supervise the work of Mike Hayes?

7 A. I am not in Mike's direct chain of supervision, no.

8 Q. So you never personally informed Mr. Hayes that he needs to
9 credit the work of photographers?

10 A. I have given trainings and my team has given trainings over
11 the years, a multitude of times, and Mike has attended. I do
12 not recall whether Mike has been in attendance for my specific
13 trainings, for the subject matter of the training that Mike was
14 in attendance for.

15 Q. Who was Wajmah Yaqubi?

16 A. Yaqubi one of my direct reports.

17 Q. Is she the director of rights and clearances?

18 A. I believe that is her title, yes.

19 Q. You supervise her work at BuzzFeed?

20 A. Yes, I do.

21 Q. Is Mike Hayes required to clear photographers directly with
22 Ms. Yaqubi before he publishes them to BuzzFeed's website?

23 A. No.

24 Q. Is Mike Hayes able to publish a photograph on BuzzFeed's
25 website without obtaining any clearance from legal?

18DAAMAN2

Brehm - Direct

1 A. Mike does not need to contact the legal department to
2 publish a photograph, no.

3 MR. FREEMAN: OK. Plaintiff respectfully refers the
4 Court to Plaintiff's Exhibit 20, which has been previously
5 marked in evidence.

6 Your Honor may I approach the witness?

7 THE COURT: Yes.

8 (Pause)

9 Q. Mr. Brehm, do you recognize this news article?

10 A. Yes, I do.

11 Q. When you learned about the present lawsuit of copyright
12 infringement, did you speak to Mr. Hayes?

13 A. I have spoken with Mr. Hayes since learning about this.

14 Q. And did you speak to Ms. Yaqubi?

15 A. Yes.

16 Q. Did you instruct either Mr. Hayes or Ms. Yaqubi to contact
17 Liane Fisher of Fisher & Taubenfeld to determine whether
18 Ms. Fisher had licensed the photograph to BuzzFeed?

19 A. Yes. To break that down specifically, when we received the
20 lawsuit we reached out to Mike of course immediately. Mike was
21 out on paternity leave at the time. So we didn't have easy
22 conversation with him or easy contact with him.

23 I do not believe we instructed Mike to reach out to
24 Ms. Fisher. I am honestly not sure how that happened. I was
25 aware that he did after the fact. Certainly at a certain point

18DAAMAN2

Brehm - Direct

1 he was -- again, we were having a difficult time conversing
2 with him because he was out on leave. I asked Ms. Yaqubi to
3 follow up with Ms. Fisher and instructed her to send the e-mail
4 that we've seen in one of your other exhibits, yes.

5 Q. That was around September 13 through September 20, 2017?

6 A. That strikes me as the right timeframe.

7 Q. And was Ms. Yaqubi or Mr. Hayes able to determine at that
8 time in September of 2017 whether Ms. Fisher had granted
9 BuzzFeed a license for the photograph?

10 A. Were we able to determine at that time, no, we were not.

11 Q. You were not.

12 So when did you reach the conclusion that BuzzFeed did
13 not have a license to publish Mango's photograph?

14 MS. LACKMAN: Objection. Calls for a legal
15 conclusion.

16 THE COURT: Overruled.

17 A. I don't recall specifically. I don't recall specifically,
18 no.

19 MR. FREEMAN: Plaintiff respectfully refers the Court
20 to Exhibit No. 81.

21 May I have the Court's permission to approach the
22 witness?

23 THE COURT: Yes.

24 (Pause)

25 Q. Do you recognize this e-mail?

18DAAMAN2

Brehm - Direct

1 A. Yes.

2 Q. And is it accurate to state that this is the e-mail from
3 Mike Hayes to Liane Fisher inquiring about whether Ms. Fisher
4 had provided the photograph for this story?

5 A. I believe so.

6 MR. FREEMAN: Plaintiff would like to identify
7 Plaintiff's Exhibit 85.

8 Your Honor, may I have the Court's permission to
9 approach the witness?

10 THE COURT: Yes.

11 (Pause)

12 Q. Mr. Brehm, you recognize this e-mail?

13 A. Yes.

14 Q. And is it accurate to state that Ms. Fisher informed
15 Ms. Yaqubi that she did not forward a picture of Mr. Parker to
16 Mr. Hayes?

17 A. I'm sorry. Can you repeat the question?

18 Q. Does this e-mail from Ms. Fisher to Ms. Yaqubi, who I think
19 you've testified you supervise, does that e-mail state that
20 Ms. Fisher cannot locate any e-mail in which she had forwarded
21 a picture of Mr. Parker to Mr. Hayes?

22 A. The e-mail says, "I cannot locate the e-mail where I
23 forwarded you a picture of Mr. Parker." Mr. Parker it says,
24 actually.

25 Q. And at that point in time did you reach the conclusion that

18DAAMAN2

Brehm - Direct

1 BuzzFeed did not have a license to publish Mango's photograph?

2 A. No. Sorry, counsel. The e-mail in fact confirmed with us
3 that this was a question. She said she couldn't locate the
4 e-mail where she forwarded you the picture of Mr. Parker. In
5 our minds we still had every reason to believe at that time --
6 Mr. Hayes was still fairly certain -- that he received it
7 directly from Ms. Fisher. And Ms. Fisher by saying I cannot
8 locate the e-mail seemed to suggest that she, like we, were
9 having difficulty finding the e-mail where it was transferred.

10 Q. And she indicated here that perhaps Mr. Parker was the one
11 who had provided the photograph. Did you ever follow up with
12 Mr. Parker?

13 A. We did not.

14 Q. After this lawsuit was filed on September 5, 2017, did you
15 disseminate an internal memorandum to the news editors at
16 BuzzFeed asking them to take further precautionary measures to
17 insure that photographers were properly credited in BuzzFeed
18 news articles?

19 A. Did I?

20 Q. Or the legal department.

21 A. No. We had no reason to do that.

22 Q. And during the course of this litigation were you asked to
23 produce any documents concerning press kits that BuzzFeed
24 received from attorneys over the last year?

25 A. I do not recall that specific question.

18DAAMAN2

Brehm - Direct

1 Counsel, if you are asking whether I reviewed your
2 document requests or I saw your document requests, I did. I do
3 not recall specifically whether that request was in there.

4 MR. FREEMAN: I'd like to mark as -- I'd like to
5 identify Plaintiff's Exhibit 93.

6 Your Honor, may I have permission to approach the
7 witness?

8 THE COURT: Yes.

9 (Pause)

10 MS. LACKMAN: I have an objection on this as I stated
11 before.

12 MR. FREEMAN: Let me see if I can set the foundation.

13 THE COURT: Yes.

14 Q. Mr. Brehm, do you recognize this document dated July 9th of
15 2018?

16 A. I do not.

17 Q. You do not.

18 Does Ms. Lackman customarily provide you with
19 correspondence between plaintiff's counsel and defendant's
20 counsel?

21 A. I believe so.

22 Q. And you were present at mediation back in February,
23 correct?

24 A. Yes.

25 Q. Have you been kept apprised of developments in this case?

18DAAMAN2

Brehm - Direct

1 A. Yes.

2 MR. FREEMAN: Your Honor, I'd like to move, plaintiff
3 respectfully moves for admission of Plaintiff's Exhibit 93.

4 MS. LACKMAN: Objection. Relevance.

5 No motion to compel was filed. There is no further
6 correspondence. The witness doesn't know anything about this
7 or doesn't recall anything about this. He is aware of the
8 request. I am sure I have other reasons as to why this is
9 inadmissible, but this is hearsay. I'm not testifying to it,
10 and it also does not bear any relevance to the issues in the
11 case. Whether or not he asked for documentation is of no
12 moment. He never raised the matter with the Court.

13 THE COURT: All right. Thank you.

14 The most important thing, Mr. Freeman, is that the
15 witness has said he has no recollection of this. This is not
16 the person through whom to introduce the document.

17 Sustained.

18 MR. FREEMAN: OK.

19 Q. Mr. Brehm, how many times has BuzzFeed been sued for
20 copyright infringement in the last two years?

21 A. I honestly don't know an exact number.

22 Q. Is it more than three times?

23 MS. LACKMAN: Objection.

24 THE COURT: Overruled.

25 A. Counsel, your law firm has sued my, has sued my company

18DAAMAN2

Brehm - Direct

1 more than three times.

2 Q. More than five times?

3 A. Your law firm may have sued my company more than five
4 times.

5 MR. FREEMAN: Plaintiff identifies exhibit marked
6 Plaintiff's Exhibit 48.

7 My apologies I forgot to ask if I could approach.

8 THE COURT: Yes.

9 Q. Mr. Brehm, do you recognize this lawsuit, Massey v.
10 BuzzFeed, 17 CV 1553?

11 A. I am aware of the lawsuit, yes.

12 Q. It's a copyright infringement action involving a
13 photograph, correct?

14 A. Yes.

15 MR. FREEMAN: Your Honor, plaintiff respectfully moves
16 the Court to admit Plaintiff's Exhibit 48 into evidence.

17 MS. LACKMAN: Objection. Relevance. The fact that
18 someone sued someone for whatever reason.

19 THE COURT: Sustained.

20 MS. LACKMAN: Thank you.

21 MR. FREEMAN: Your Honor, may I respond?

22 THE COURT: Sustained.

23 MR. FREEMAN: No further questions, your Honor.

24 THE COURT: Ms. Lackman.

25 CROSS-EXAMINATION

18DAAMAN2

Brehm - Cross

1 BY MS. LACKMAN:

2 Q. Just a couple question questions.

3 How many articles, news articles a day roughly does
4 BuzzFeed publish?

5 A. Sorry. News articles, I'm not certain. I know we publish
6 on average more than 600 pieces of content a day, many of
7 which, if not most or all of which contain photographs. Many
8 of which contain far more than one photograph.

9 Q. So in your experience would it be difficult for BuzzFeed's
10 legal department to review 600 articles a day for copyright
11 infringement?

12 A. Yes. This is not to say that we are not staffed up. The
13 staffing on the legal department with respect to rights and
14 clearances is significant. I oversee the department. There
15 are three other attorneys who work within rights and
16 clearances. There is a staff of at least four other rights and
17 clearance specialists. That's a team of eight.

18 I'm sorry. I am losing count of fingers.

19 I believe there are at least eight people involved in
20 the rights and clearances process from the legal department.
21 The legal department trains editors, trained every person who
22 is a content maker at BuzzFeed, undergoes copyright training on
23 a regular basis, on a repeated basis, and for spot issues,
24 because we cannot review 600 pieces of content a day. But the
25 review process is thorough.

18DAAMAN2

Brehm - Cross

1 Q. So your understanding is that the training process is
2 supposed to work, that people are supposed to learn something
3 by virtue of the training process and thereby not have to ask
4 you everyday to review everything?

5 A. Yes. That is exactly what we have done. Our intent is to
6 a train people to make their own informed decisions and to make
7 appropriate ones.

8 Q. At some point during this litigation you became aware of
9 the fact that the photograph used in the article came from the
10 New York Post, is that correct?

11 A. That is correct.

12 Q. So on learning that there was no need to ask Mr. Parker,
13 right?

14 A. Correct. We also knew -- sorry. We also knew that no one
15 internally at BuzzFeed had reached out to Mr. Parker nor did we
16 think that the photograph was a selfie. Mr. Parker didn't take
17 that photograph.

18 Q. And then briefly on the Massey case that Mr. Freeman
19 mentioned, do you recall that?

20 A. I do.

21 Q. And that matter was resolved before trial?

22 A. Yes, along with several other matters that counsel has
23 raised.

24 You asked the question had lawsuits been brought
25 against us. Counsel's firm brought lawsuits against us and

18DAAMAN2

Brehm - Redirect

1 dropped them, brought lawsuits against us and settled them,
2 brought lawsuits against us like the one here that's going to
3 trial. There may be others.

4 Q. And the case involving Mr. Massey's photograph, BuzzFeed
5 asserted a defense of fair use, is that correct?

6 A. That's correct.

7 Q. Because the story at issue talked about the photograph,
8 right?

9 A. Discussed it in detail.

10 MS. LACKMAN: I have no further questions.

11 MR. FREEMAN: Just one quick.

12 THE COURT: Yes.

13 MR. FREEMAN: Plaintiff identifies Plaintiff's Exhibit
14 96.

15 Your Honor, may I approach the witness?

16 THE COURT: Yes.

17 (Pause)

18 REDIRECT EXAMINATION

19 Q. Mr. Brehm, do you recognize this document?

20 A. Yes.

21 MR. FREEMAN: Your Honor, plaintiff respectfully moves
22 to admit Plaintiff's Exhibit 96 into evidence.

23 THE COURT: This is a stipulation?

24 MR. FREEMAN: Yes.

25 THE COURT: Presumably it's already in evidence.

18DAAMAN2

Brehm - Redirect

1 MR. FREEMAN: Actually, it was never placed on ECF.
2 So I figured just for housekeeping measures.

3 THE COURT: Admitted.

4 (Plaintiff's Exhibit 96 received in evidence)

5 THE COURT: Proceed.

6 MR. FREEMAN: That is it. I just wanted to put it in.

7 THE COURT: All right.

8 MR. FREEMAN: Thank you, Mr. Brehm. I appreciate it.

9 THE COURT: Mr. Brehm, I have a couple questions for
10 you.

11 For this purpose, if you can turn to the plaintiff's
12 exhibit binder and begin with No. 77.

13 THE WITNESS: I'm sorry. I don't have the binder in
14 front of me, your Honor.

15 MR. FREEMAN: Which number was it?

16 THE COURT: Begin with 77.

17 (Pause)

18 MS. LACKMAN: The metadata shot?

19 THE COURT: Yes.

20 Also give him 20 and 13.

21 (Pause)

22 THE WITNESS: I have 20.

23 THE COURT: Thirteen?

24 THE WITNESS: I am not sure which 13 is, your Honor.

25 MS. LACKMAN: The New York Post article from January.

18DAAMAN2

Brehm - Redirect

1 (Pause)

2 THE COURT: All right. Mr. Brehm, starting with
3 Exhibit 77.

4 THE WITNESS: Yes.

5 THE COURT: Do you understand what that document
6 purports to show and to what extent is that the process for
7 obtaining information and photographs from the internet, as
8 indicated here, part of the training that is provided to your
9 writers and editors?

10 THE WITNESS: I'm not sure of the exact question, your
11 Honor. I am familiar with what that file is, what this
12 document is.

13 THE COURT: Does this file represent a common
14 procedure by which your editors and writers obtain photographs?

15 THE WITNESS: I'm not -- I'm sorry. Do we obtain
16 photographs from the internet for publication?

17 THE COURT: Does this represent --

18 THE WITNESS: Sorry, Judge. What this information is,
19 just so you know, this is a file information. So any document
20 you have or any piece of data that you have, any file that you
21 have on a computer will have a similar type of thing. This is
22 just the information from the file.

23 This was the information from a photograph on a
24 document. A Microsoft Word document or a downloaded PDF
25 document will have a similar file. So this document,

18DAAMAN2

Brehm - Redirect

1 Plaintiff's Exhibit 77, is merely a printout of all of the data
2 that was attached to that file document.

3 THE COURT: But in order to obtain that data somebody
4 has to input something into the computer. There's a process by
5 which to do that.

6 THE WITNESS: It is done on another end. The person
7 who places the data on the internet or the person who created
8 the file that we're discussing, that could be a file that was
9 created by you or me or anyone in the room, or by The New York
10 Post or by someone else whoever creates that file attaches the
11 data that appears in this printout.

12 THE COURT: But in this case Mr. Hayes obtained access
13 to that data.

14 THE WITNESS: Yes, he did.

15 THE COURT: So he knew how to do that.

16 THE WITNESS: Yes. Well --

17 THE COURT: Presumably.

18 THE WITNESS: A matter of clicking, your Honor.

19 THE COURT: All right. Is the process by which you
20 obtained photographs like this part of the training that your
21 editors and writers go through?

22 THE WITNESS: We discuss ways to obtain photographs
23 appropriately and legally, so yes.

24 THE COURT: All right. So now turn to exhibit No. 20.
25 This is the photograph that actually appeared in the BuzzFeed

18DAAMAN2

Brehm - Redirect

1 article. You will note that on the lower left-hand part of the
2 photograph it includes the name of Mr. Parker and Fisher &
3 Taubenfeld.

4 If you turn back to 77, there's no indication of the
5 title or the source.

6 THE WITNESS: I would say that there is a title. The
7 name of the document is raymond-parker.jpeg, which I think
8 appears about a little over halfway -- a little less than
9 halfway down the page on the first page of Plaintiff's Exhibit
10 77.

11 As for the reference to Fisher & Taubenfeld, your
12 Honor, that reflected to us, and throughout the investigation
13 was consistent with my case, is recollection that he received
14 permission to use this photograph from Liane Fisher in his
15 telephone call and was appropriately trying to credit the
16 person who he received permission from.

17 THE COURT: Well, let's move back a couple of steps.
18 When your editors and writers obtain photographs such as
19 exhibit No. 77 that do not include attribution to a
20 photograph -- does that happen? Is it common?

21 THE WITNESS: I do not know if it happens or how often
22 it happens. It is certainly possible that it happens.

23 THE COURT: What does your policy and training
24 provide, instructions for the editors and writers to do in a
25 case like that?

18DAAMAN2

Brehm - Redirect

1 THE WITNESS: The overarching instruction will be not
2 to use a photograph without permission unless there are certain
3 circumstances to which fair use applies or others that I could
4 contemplate.

5 There's also a second step. That second step is to
6 always attempt to determine the person who -- to determine the
7 origin of the photograph.

8 THE COURT: Well, that's what I'm referring to.

9 THE WITNESS: Right.

10 THE COURT: Permission assumes that you know who to
11 ask permission of, but in this case there is no indication of
12 anybody.

13 THE WITNESS: There was not in this file.

14 THE COURT: So what does your training provide your
15 editors and writers to do when they find the photograph by this
16 means that does not have attribution of the owner?

17 THE WITNESS: Judge, I hope you would not be surprised
18 to know that with 600 pieces of content a day we can't
19 anticipate all mean by which people will find photographs.

20 What we suggest is that if you find a photograph that
21 you cannot immediately attribute or directly attribute to
22 someone, that you endeavor to find that source or to find -- to
23 find the source of the photograph.

24 There's a whole body of law built around orphan works.
25 It is not unusual to find a photograph where you cannot

18DAAMAN2

Brehm - Redirect

1 identify the actual author or the owner of the copyright.

2 We inform people to make best efforts and to reach out
3 to legal for help when they feel that there is any question
4 with respect to having the authority to use the photograph or
5 not.

6 THE COURT: OK. In this case Mr. Hayes by looking at
7 the metadata information knew that this photograph came from
8 The New York Post.

9 THE WITNESS: To be candid, Judge, I don't know that
10 Mr. Hayes ever saw that metadata before this lawsuit was filed.

11 THE COURT: Look at Exhibit 77.

12 THE WITNESS: I see.

13 THE COURT: It was created, on top, Tuesday April 11,
14 11:48 a.m.

15 THE WITNESS: That is certainly the time that Mr.
16 Parker downloaded this photograph. That would seem the time
17 that the file was created on his computer.

18 THE COURT: On Mr. Parker's computer?

19 THE WITNESS: Sorry. On Mr. Hayes's computer.

20 THE COURT: So --

21 THE WITNESS: Judge, if you are asking did Mr. Hayes,
22 do I think Mr. Hayes knew he got the photograph from the Post,
23 I believe he did. I think that's very clear.

24 THE COURT: Excuse me. Let me finish, please.

25 THE WITNESS: Sure.

18DAAMAN2

Brehm - Redirect

1 THE COURT: Mr. Hayes created the document at
2 11:48 a.m. and down below it says he got it from The New York
3 Post.

4 THE WITNESS: Yes.

5 THE COURT: Now, if you turn to Exhibit 13. Do you
6 have 13?

7 THE WITNESS: I don't.

8 MS. LACKMAN: The January article from The Post.

9 THE WITNESS: Yes, I do.

10 THE COURT: Look at lower left-hand corner.

11 THE WITNESS: OK.

12 THE COURT: So The New York Post's picture of
13 Mr. Parker attributed the photograph to Mr. Mango, correct?

14 THE WITNESS: Yes.

15 THE COURT: So if Mr. Hayes had called The New York
16 Post realizing that the picture that he saw did not have
17 attribution of the photographer and that it came from The New
18 York Post and he called The New York Post, they may have told
19 him that the photograph came from Mr. Mango. Is; that a fair
20 statement?

21 THE WITNESS: Yes.

22 THE COURT: But he did not.

23 THE WITNESS: He did not.

24 THE COURT: He instead assumed that it came from
25 Fisher & Taubenfeld.

18DAAMAN2

Brehm - Redirect

1 THE WITNESS: Your Honor, I believe it was more than
2 an assumption on his part. It was his understanding that
3 Fisher & Taubenfeld had the authority to grant that to him.
4 Sitting here today --

5 THE COURT: Excuse me, please. That was based on the
6 discussion on the telephone with Ms. Fisher earlier in the
7 morning.

8 THE WITNESS: Yes.

9 THE COURT: But you heard Ms. Fisher testify that she
10 does not have recollection of having told him that that
11 photograph was in The New York Post.

12 THE WITNESS: Right. But I also heard Mr. Hayes
13 telling, consistent with the story he told me in the beginning,
14 that he recalls Ms. Fisher giving him that permission. He
15 believed in it so wholeheartedly that he asked for the e-mail
16 regarding that.

17 Ms. Fisher responded back with the exhibit we've just
18 read, Judge, which said I can't locate the e-mail where I sent
19 it to you. Ms. Fisher seemed to innately recall that she gave
20 him permission for something as well.

21 All of this was, unfortunately, six months later.

22 THE COURT: All right. Thank you. You may step down.
23 You are excused.

24 MS. LACKMAN: Can I do a little clean-up?

25 THE COURT: Yes.

18DAAMAN2

Brehm - Recross

1 MR. FREEMAN: No further questions.

2 RECROSS EXAMINATION

3 BY MS. LACKMAN:

4 Q. Looking back at Exhibit 77, is the data that's shown
5 ordinarily visible to someone looking at, for example, The New
6 York Post article?

7 A. No.

8 Q. Do people who obtain photos routinely open up the file
9 information to check it?

10 A. Not that I'm aware.

11 Q. Do you have any understanding as to what the circumstances
12 were for obtaining what's shown in Exhibit 77?

13 A. The data that's shown in Exhibit 77, I do.

14 Q. OK. And what is that?

15 A. This was done in response to discovery requests regarding
16 the photograph at issue. We did our very best to find the
17 e-mail exchange which Mr. Hayes recalled and to which
18 Ms. Fisher alluded. We could not find that anywhere. We went
19 to Mr. Hayes's computer to find the earliest version or any
20 version of the photograph. When we found that photograph on
21 his computer, we accessed this data. The metadata we would
22 call it. We printed that out and supplied it as part of our
23 document production.

24 Q. So the date that shows the created date, does that reflect
25 the date that the file that we're looking at was created?

18DAAMAN2

Brehm - Recross

1 A. That reflects the -- sorry -- the created date.

2 Q. April 11, 2017, do you have an understanding of what that
3 date reflects?

4 A. Yes.

5 Q. And that's what understanding?

6 A. Sorry. The understanding is that that photograph of
7 Raymond Parker appeared on Mr. Hayes's computer for the first
8 time or was saved on Mr. Hayes's computer for the first time on
9 Tuesday, April 11, at 11:48 a.m.

10 Q. So this is the file that is automatically created upon
11 download?

12 A. That is my understanding.

13 Q. In order to access the metadata, when you went to -- when
14 that file was obtained, was it sitting in that format visible
15 or did something have to be done to pull it up?

16 A. I do not know how this was specifically pulled up. You
17 usually have to access it through a separate program. It is
18 not something that immediately appears.

19 This may have been under the info section where your
20 computer operating system can provide you with information on
21 files on the computer. I would be speculating as to how that
22 was done.

23 Q. Is this metadata created automatically by a computer upon
24 saving?

25 A. That is my understanding.

18DAAMAN2

Brehm - Recross

1 Q. So if I have a folder of photographs, I am not going to see
2 the metadata unless I specifically inquire?

3 A. Correct.

4 Q. In the circumstance such as this where a party has already,
5 at least under Mr. Hayes's view, already provided authority, is
6 there any reason to inquire, to followup and say, no, that's
7 not in the metadata or anything like that?

8 A. We would assume once given authority from a reputable
9 source that could be reasonably relied upon and not knowing
10 anything contrary to that, that it would be acceptable to cease
11 your investigation into that.

12 We saw nothing inconsistent with the permission that
13 was granted.

14 Q. And did Mr. Hayes tell you that Ms. Fisher said that he
15 should use the photo that --

16 A. Mr. Hayes was under the impression from the very first time
17 we spoke to him that he had been given permission by Ms. Fisher
18 to use the photograph.

19 Q. And did he mention to you whether or not he knew of The New
20 York Post article prior to talking to Ms. Fisher?

21 A. He did not discuss timeframes with us.

22 Q. Exhibit 13. Take a look at that.

23 A. Sure.

24 Q. Do you see the writeup that is on that exhibit?

25 A. I do.

18DAAMAN2

Brehm - Recross

1 Q. Does Mr. Mango's name appear in the same font style or
2 color as Mr. Parker's name?

3 A. No, it does not.

4 Q. I noticed you removed your glasses when you picked up that
5 exhibit. Is there some reason for that?

6 A. I did. Like counsel, I'm over the age of 40 and I cannot
7 read that line sitting here with my glasses on. I can read
8 every other line on page. I cannot read the second line under
9 the term Raymond Parker. I could not read Mr. Mango's name
10 without taking my gases up and holding it up.

11 Q. Is it conceivable that Mr. Hayes couldn't have seen the
12 credit when he looked at it?

13 A. In my mind it is, but he is here.

14 Q. OK. All right.

15 MS. LACKMAN: I have no further questions.

16 MR. FREEMAN: No further questions, your Honor.

17 THE COURT: Mr. Brehm, another question. The question
18 is maybe more a question of computer technology than copyright
19 law. But in Exhibit 77 when someone is obtaining the metadata
20 and uploading a photograph -- the photograph came from Exhibit
21 13 which was a New York Post file. When someone creates the
22 photograph for the metadata, does the computer automatically
23 cut off the gutter credits?

24 THE WITNESS: We will look at this metadata from time
25 to time as part of investigations into usage questions and

18DAAMAN2

Brehm - Recross

1 rights. I've never seen gutter credits attached to metadata.
2 You will frequently see, your Honor, I will say this, you will
3 frequently see a photographer's credit or photographers when
4 they upload photographs, for example, onto photo-sharing sites
5 can load metadata along with their photographs.

6 Many photographers, and Mr. Mango will probably be
7 able to testify to this better than I can. The metadata
8 captured in a photograph will tell you the type of camera that
9 was used, the date that it was taken, the time that it was
10 taken. Often metadata includes reference to a photographer.
11 This did not.

12 THE COURT: OK. Thank you. You are excused. You may
13 step down.

14 (Witness excused)

15 THE COURT: Mr. Freeman.

16 MR. FREEMAN: Thank you, your Honor. So there's one
17 more witness left in our case. I believe in the entire case.

18 MS. LACKMAN: Correct. Actually, Mr. Hayes is back if
19 the Court has maybe --

20 THE COURT: Yes. Mr. Hayes take the stand again.

21 Mr. Hayes, you remain under oath, the same oath that
22 you took this morning.

23 MICHAEL HAYES, recalled.

24 THE COURT: Just a follow-up question, Mr. Hayes,
25 something that I raised earlier but did not pursue fully

18DAAMAN2

Brehm - Recross

1 relating to Exhibit No. 77, which was a picture with the
2 metadata. This goes essentially to the question that I was
3 asking Mr. Brehm. The photograph that appears in Exhibit 77
4 does not have the gutter credits, correct?

5 THE WITNESS: Yes.

6 THE COURT: And this is the way you saw the photograph
7 originally?

8 THE WITNESS: Yes, I believe so.

9 MS. LACKMAN: I'm sorry, Judge. For clarification, is
10 the Court talking about seeing the metadata original or seeing
11 the photograph original?

12 THE COURT: I am assuming that the metadata and
13 photograph are part of the same document. Is it not --

14 MS. LACKMAN: Not necessarily.

15 THE COURT: -- in this case?

16 MS. LACKMAN: As Mr. Brehm testified, this is a file
17 that accompanies the photograph. It is not ordinarily visible
18 unless you seek it out.

19 THE COURT: All right.

20 Let me ask Mr. Hayes directly. When you saw the
21 metadata that's part of Exhibit No. 77, did that exhibit or
22 that document that you examined contain the photograph of
23 Mr. Parker that's at the bottom of Exhibit No. 77?

24 THE WITNESS: I am a little confused by your question.

25 THE COURT: Let me start again.

18DAAMAN2

Brehm - Recross

1 You asked Ms. Fisher for a photograph of Mr. Parker
2 and she said I'll look to see if I could find one, correct?

3 THE WITNESS: I don't recall exactly.

4 THE COURT: It was an e-mail exchange in which you
5 said can you share a photograph.

6 THE WITNESS: Correct.

7 THE COURT: So you were looking for a photograph.

8 THE WITNESS: Correct.

9 THE COURT: And at some point, whether or not from
10 Ms. Fisher or otherwise, you found that there was a photograph
11 of Mr. Parker in The New York Post files.

12 THE WITNESS: As I believe I testified earlier, I
13 spoke to Ms. Fisher on the phone and followed up on my inquiry
14 about a photograph. At that point she advised me to use this
15 photograph.

16 THE COURT: Let's put aside what she advised you. The
17 question is, you went to The New York Post files, correct?

18 THE WITNESS: After speaking to Ms. Fisher, yes.

19 THE COURT: Let's put Ms. Fisher aside.

20 You went to The New York Post files and you obtained
21 information from The New York Post files indicating that there
22 was a photograph of Mr. Parker in those files.

23 THE WITNESS: I went to --

24 MS. LACKMAN: I'm sorry, Judge. I hate to object to
25 the question, but he testified that he went to the article, not

18DAAMAN2

Brehm - Recross

1 to anyone's files.

2 MR. FREEMAN: We agree with that, your Honor, for
3 clarification.

4 THE COURT: All right. In The New York Post files you
5 found the article.

6 MR. FREEMAN: Online. The New York Post article is
7 posted online. So anyone could just visit it. What we believe
8 he did is he just right clicked on the photograph that was
9 actually displayed on The New York Post article and downloaded
10 it. Like we could do that right now if we had access to the
11 internet.

12 MS. LACKMAN: We actually do. It would help the Court
13 to show and try to recreate the process.

14 THE COURT: We're not there yet.

15 When you downloaded the photograph, Mr. Hayes, did the
16 photograph as it appeared in that New York Post online contain
17 what is in Exhibit 13? You saw a story, correct? You
18 downloaded the whole story?

19 THE WITNESS: No, I downloaded the photograph from the
20 URL.

21 THE COURT: Did the photograph contain the name of
22 Mr. Parker and the name of Gregory Mango?

23 THE WITNESS: Not to my knowledge.

24 THE COURT: So what you saw, essentially, was what is
25 in Exhibit 77?

18DAAMAN2

Brehm - Recross

1 THE WITNESS: What I saw is essentially the image
2 contained in Exhibit 77, yes.

3 THE COURT: So the exhibit of course as you saw it did
4 not contain the gutter information.

5 What is your understanding of your practice or the
6 company policy of what to do when you come upon a photograph
7 that does not have the gutter credits?

8 THE WITNESS: My understanding is the company policy
9 is to attribute the photo to the source of the photographic
10 gutter.

11 THE COURT: All right. But now, Mr. Hayes, at that
12 point you knew that the source of the photo was The New York
13 Post because that's where you got it.

14 THE WITNESS: I was advised by Ms. Fisher that she had
15 the authority to distribute this photo to media outlets and
16 when she told me to use that photo, I followed her
17 instructions.

18 THE COURT: She specifically told you that she had the
19 authority to distribute this particular photo?

20 THE WITNESS: That is my recollection, yes.

21 THE COURT: So even though The New York Post site did
22 not have the gutter credits, you did not call The New York Post
23 to find out if they had the name of the photographer?

24 THE WITNESS: I didn't think it was necessary after
25 speaking to Ms. Fisher that I needed to do that.

18DAAMAN2

Brehm - Recross

1 THE COURT: So your testimony is that you understood
2 Ms. Fisher to have told you that she had the authority to
3 essentially license your use of that photograph.

4 THE WITNESS: Yes.

5 THE COURT: Thank you.

6 Mr. Freeman.

7 MR. FREEMAN: Yes. A quick point of clarification,
8 your Honor. I believe Mr. Hayes testified that he visited the
9 URL for The New York Post article, which is actually in
10 Plaintiff's Exhibit 13, where we could visit it today. So on
11 Plaintiff's Exhibit 13 Gregory Mango's name is listed on the
12 gutter credit. So the idea is that, well, if he went to The
13 New York Post URL and he saw the photograph, which is where he
14 downloaded it, then he also must have seen the CMI, the gutter
15 credit to Mr. Mango. He then downloaded the photograph onto
16 his desktop. At that point you can then right click on the
17 photograph, the JPEG file, and that's where you get Exhibit 77.

18 Now, in 77 Gregory Mango's gutter credit is not
19 listed. It's only listed on the face of website that is
20 screenshotted in Plaintiff's Exhibit 13.

21 THE COURT: All right. Let me then come back again to
22 Mr. Hayes. Was Exhibit No. 13 the first time that you saw the
23 photograph of Mr. Parker?

24 THE WITNESS: I believe so, yes.

25 THE COURT: You saw the entire article in The New York

18DAAMAN2

Brehm - Recross

1 Post, not just the photograph.

2 THE WITNESS: I don't recall if I read the entire
3 article at the time I saw the photo.

4 THE COURT: But did you read the whole article?

5 THE WITNESS: At some point I probably read the
6 article.

7 THE COURT: If you read The New York Post article
8 that's in Exhibit No. 13, why would the photograph as it
9 appears in Exhibit 13 not have been what you first saw in its
10 entirety?

11 THE WITNESS: I don't understand the question.

12 THE COURT: When you went to The New York Post site to
13 look at the article that you say Ms. Fisher had directed you
14 to, you saw this article and the article contained a narrative
15 down at the bottom, but it also contained a photograph,
16 correct?

17 THE WITNESS: Yes.

18 THE COURT: Was the photograph that it contained
19 exactly the same one that is in Exhibit 13?

20 THE WITNESS: Yes.

21 THE COURT: That exhibit says Raymond Parker, Gregory
22 P. Mango.

23 THE WITNESS: Yes.

24 THE COURT: So in that event when you created Exhibit
25 No. 77 and lopped off the gutter credit --

18DAAMAN2

Brehm - Recross

1 THE WITNESS: I never lopped off any gutter credits.

2 THE COURT: Well, you download the picture that
3 effectively removed the gutter credit.

4 THE WITNESS: That's incorrect, Judge.

5 THE COURT: Then correct me. How --

6 THE WITNESS: Exhibit 77 isn't an exact verbatim copy
7 of the file that was on The New York Post website. The fact
8 that there is no gutter credit in Exhibit 77 should indicate to
9 you that there's no gutter credit or, in the metadata for a
10 photo that is on The New York Post website.

11 THE COURT: All right. Mr. Hayes, chronologically
12 before you created what's Exhibit No. 77, before had you
13 already seen Exhibit No. 13, which is the sister story itself,
14 with the photograph?

15 THE WITNESS: Exhibit 77 was created this past fall
16 when we were investigating the source of the photo. It is my
17 recollection that I created what is represented at the
18 screenshot in Exhibit 77.

19 I did the work personally to seek out the information
20 about this photo, and that was done roughly sometime last fall
21 when we were investigating the source of the photo.

22 THE COURT: Then we have to step back not to last fall
23 but to April 11, 2017 sometime in the morning. Sometime before
24 noon.

25 Let's go back to that date. You need a photograph of

18DAAMAN2

Brehm - Recross

1 Mr. Parker.

2 THE WITNESS: Yes.

3 THE COURT: You say you asked Ms. Fisher for a
4 photograph.

5 THE WITNESS: Yes.

6 THE COURT: You say she directed you to The New York
7 Post.

8 THE WITNESS: Yes.

9 THE COURT: You went to The New York Post site and you
10 saw Exhibit No. 13.

11 THE WITNESS: Yes.

12 THE COURT: Exhibit No. 13 has gutter credits.

13 THE WITNESS: Yes.

14 THE COURT: The gutter credit includes Gregory Mango.

15 THE WITNESS: Yes.

16 THE COURT: Now you write your story in Exhibit No. 20
17 and you have the photograph that you had seen in The New York
18 Post, correct?

19 THE WITNESS: Yes.

20 THE COURT: And now instead of saying Gregory Mango,
21 it says Fisher & Taubenfeld. How did that come about?

22 THE WITNESS: First off, as I testified, Ms. Fisher
23 was the one who instructed me to use the photo. So I
24 believe --

25 THE COURT: Sorry, Mr. Hayes. Having seen Exhibit No.

18DAAMAN2

Brehm - Recross

1 13, you knew that The New York Post attributed the photograph
2 to Mr. Mango.

3 THE WITNESS: I don't know that when I saw this
4 article for the first time in April. I did not see Mr. Mango's
5 name there. Again, it's very faint as it appeared, and it is
6 my recollection that I did not see his name at that time.

7 THE COURT: It may be faint, Mr. Hayes, but you don't
8 really need a magnifying glass to see that there is an
9 attribution of a name there and that it is not Fisher &
10 Taubenfeld.

11 How did Fisher & Taubenfeld or Fisher & Taubenfeld's
12 name come up substituting for Gregory Mango? How did that
13 happen?

14 THE WITNESS: As I said several times this morning,
15 Ms. Fisher --

16 THE COURT: I understand what you thought.
17 Technically, who typed in that name?

18 THE WITNESS: As I believe I testified earlier, when I
19 created this article I attributed the photo to Fisher &
20 Taubenfeld.

21 THE COURT: You had a photograph of Mr. Parker that
22 presumably had Gregory Mango's name in the gutter and either
23 you or someone else then substituted Mr. Mango's name with
24 Fisher & Taubenfeld.

25 MS. LACKMAN: Judge, I am sorry. I think the parties

18DAAMAN2

Brehm - Recross

1 may be talking past each other.

2 THE COURT: Let me see if he can answer that question
3 first.

4 THE WITNESS: Could you repeat the question?

5 THE COURT: At some point in the morning, around
6 noontime of April 11, you saw The New York Post article that
7 had a picture of Mr. Parker and The New York Post article
8 attributes the photograph to Gregory Mango.

9 THE WITNESS: That is it how it appears in Exhibit 13,
10 yes.

11 THE COURT: All right. And you wanted that
12 photograph.

13 THE WITNESS: I wanted a photograph of Mr. Parker.

14 THE COURT: You came across this one.

15 THE WITNESS: I was directed to this photo about --

16 THE COURT: You came across the photograph. However
17 you came across it, you came across the photograph.

18 THE WITNESS: Yes.

19 THE COURT: And the photograph as appears in 13 has
20 Mr. Mango. As it appears in your article, it has Fisher &
21 Taubenfeld.

22 THE WITNESS: Yes.

23 THE COURT: Did you yourself substitute Fisher &
24 Taubenfeld or did you have someone else do that?

25 MS. LACKMAN: I have to object to the question, but

18DAAMAN2

Hayes - Redirect

1 you can answer if you understand.

2 THE WITNESS: Could you repeat the question?

3 THE COURT: Did you yourself substitute Fisher &
4 Taubenfeld for Mr. Mango's's name on the photograph?

5 THE WITNESS: In our CMS there is a field to enter
6 photo credits, and I believe I was the one that entered the
7 photo credit for Fisher & Taubenfeld, yes.

8 THE COURT: All right. But when you did that, was
9 Mr. Mango's name in on that line?

10 THE WITNESS: No.

11 THE COURT: What was on that line?

12 THE WITNESS: Nothing.

13 THE COURT: All right. Ms. Lackman.

14 MS. LACKMAN: Does plaintiff have anything?

15 MR. FREEMAN: Yes. I just have a couple questions.

16 THE COURT: Yes.

17 REDIRECT EXAMINATION

18 BY MR. FREEMAN:

19 Q. Mr. Hayes, if you look at Plaintiff's Exhibit 13, on the
20 second page at the top, very top, you might see that there's a
21 quotation attributed to Mr. Parker. It says: "They can't
22 disqualify me because of my disability."

23 Do you see that?

24 A. Yes.

25 Q. Now, can you turn to Exhibit 20, on the second page.

18DAAMAN2

Hayes - Redirect

1 If you go down I'd say maybe five paragraphs, right in
2 the middle of page, do you see that there's a quotation that
3 says: "They can't disqualify me because of my disability,
4 Parker told The New York Post in an interview after the lawsuit
5 was filed."

6 A. Yes.

7 Q. So is it correct to say that you used Exhibit 13 as a
8 source not only for the photograph but also for Mr. Parker's
9 interview with The New York Post?

10 MS. LACKMAN: Objection to the term "the source." He
11 didn't testify --

12 THE COURT: Overruled.

13 A. It's plain to see that I incorporated a quote from
14 Mr. Parker that was given to The New York Post and clearly
15 attributed that quote to an interview that Mr. Parker gave The
16 New York Post both in context of the article as well as in what
17 I believed to be a hyperlink based on the fact that The New
18 York Post is shaded blue here.

19 Q. And did you attempt to contact Mr. Parker in connection
20 with your own article to get your own quotation or interview
21 with Mr. Parker?

22 A. I contacted his lawyer Liane Fisher.

23 MR. FREEMAN: Thank you.

24 No further questions.

25 THE COURT: Ms. Lackman.

18DAAMAN2

Hayes - Recross

1 RECROSS EXAMINATION

2 BY MS. LACKMAN:

3 Q. Including the credits from Fisher & Taubenfeld, you
4 concluded the photo in The New York Post came from Ms. Fisher
5 at some point, is that correct?

6 A. Yes.

7 Q. And when you attributed the quote to The New York Post, you
8 as a matter of logic, or tell me if I'm wrong, you weren't
9 trying to conceal from the public that the quote came from The
10 New York Post, right?

11 A. Actually not.

12 MR. FREEMAN: Objection. That is a leading question.

13 THE COURT: Sustained.

14 MS. LACKMAN: He's been called as a hostile witness.
15 Accordingly, I am attempting to cross or redirect in that
16 regard.

17 Maybe I can ask it another way.

18 Q. If you had intended to conceal from the public that you got
19 the quote from The New York Post, would you have mentioned The
20 New York Post?

21 A. No.

22 THE COURT: All right. Ms. Lackman, I think that this
23 is all irrelevant. It has nothing to do with the photograph.

24 MS. LACKMAN: Well, to clarify:

25 Q. The hyperlink that you referenced is to the article you

18DAAMAN2

Hayes - Recross

1 were shown in Exhibit 13?

2 A. I would be willing to bet, yes.

3 Q. So basically as a matter of a layperson's terminology, you
4 click on the link and it takes to you The New York Post
5 article?

6 A. Yes.

7 Q. When did you first see Mr. Mango's name under the
8 photograph in Exhibit 13?

9 A. I probably saw it around the time that I learned about this
10 lawsuit.

11 Q. Do you have any understanding as to -- it's there. Do you
12 have any understanding as why you didn't see it?

13 A. Again, it's very faint. I don't recall seeing it before
14 that time.

15 Q. And is the gutter credit inside the photograph?

16 A. No. The gutter credit -- it's hard for me to -- I am
17 speculating on The New York Post's CMS. This is how our CMS
18 works.

19 The gutter credit I imagine was a added as a text line
20 in a field under the photo.

21 Q. So it's a separate element from the image?

22 A. I believe so. Yes. Again, the only metadata that I've
23 looked at for this photo was in Exhibit 77, I believe it is.

24 Q. So the boundaries, let's just say the boundaries of the
25 photograph, those end at the boundaries of the image, correct?

18DAAMAN2

Hayes - Recross

1 A. Correct. For this particular photograph all you have to do
2 is look at Exhibit 77, the image contained in 77, and that will
3 tell you the boundaries of the metadata for this image.

4 Q. OK. So if you right click on the image, it won't take the
5 gutter credit with it?

6 A. No.

7 Q. Earlier I believe you said that you needed a photo of
8 Mr. Parker. Someone said you need a photo. Maybe the Court
9 did. Did you need a photo of Mr. Parker?

10 A. I could have published the article without it. We
11 typically try to obtain photos, utilize photos of the subject
12 of a story that we're publishing.

13 Q. And why is that?

14 A. We believe that gives the reader your best context of the
15 story.

16 Q. What if you can't get a photo of a subject?

17 A. We'll typically still include a photo in an article and
18 we'll use something else.

19 Q. OK. So just one last question to clean up on the concept
20 of image versus the gutter credit. When you downloaded the
21 photograph, it's correct at that time the gutter credit did not
22 come with it?

23 A. Correct.

24 Q. So there was no -- in your view, was there any
25 substitution?

18DAAMAN2

Hayes - Recross

1 A. Substitution?

2 Q. Sorry. The substitution of one credit for another.

3 A. In my mind, no.

4 Q. So on BuzzFeed's system in order to include a credit, you
5 have to affirmatively type in what you want under the photo,
6 right?

7 A. Correct.

8 MS. LACKMAN: I hope that helps the Court.

9 I have no further questions.

10 THE COURT: Thank you.

11 What I am going to ask the parties to do is to find on
12 the computer that's before you, and agree upon it, the exact
13 photograph or the article from The New York Post that's in
14 Exhibit 13.

15 MS. LACKMAN: Can we show the Court, with consent of
16 plaintiff's counsel and perhaps with Mr. Hayes advising us, the
17 process of going to the article and getting the photo and
18 downloading.

19 THE COURT: Just go through the process and get the
20 photograph, the article.

21 MS. LACKMAN: Sure. We could do that now.

22 THE COURT: Get on the screen the article that
23 Mr. Hayes said he found.

24 (Pause)

25 MS. LACKMAN: Can we take a five-minute break and call

18DAAMAN2

Hayes - Recross

1 the IT person?

2 THE COURT: We have it here on the screen. You can
3 come around and see if this conforms to what your understanding
4 is of the site.

5 (Pause)

6 MS. LACKMAN: That's right.

7 MR. FREEMAN: That's it.

8 THE COURT: Mr. Hayes, can you look at that photograph
9 yourself.

10 THE WITNESS: I can see it from here, yes.

11 THE COURT: Mr. Hayes, can you just step up forward
12 and take a look at the picture.

13 (Pause)

14 THE DEPUTY CLERK: Save the picture?

15 THE COURT: Yes.

16 (Pause)

17 THE COURT: Mr. Hayes, do you see the photograph
18 clearly enough?

19 THE WITNESS: Yes.

20 THE COURT: Do you see Mr. Parker's name?

21 THE WITNESS: Yes.

22 THE COURT: Do you see Mr. Mango's name?

23 THE WITNESS: Yes.

24 THE COURT: Is Mr. Mango's name blurred, obscured, in
25 any way difficult to read?

18DAAMAN2

Hayes - Recross

1 THE WITNESS: It's difficult to read.

2 THE COURT: Difficult?

3 THE WITNESS: Yes.

4 THE COURT: It's in a lighter font maybe, but you say
5 you cannot make that out?

6 THE WITNESS: I can make it out.

7 THE COURT: But you see that there is a name there.

8 THE WITNESS: Yes.

9 THE COURT: And the name is Gregory Mango's.

10 THE WITNESS: Yes.

11 THE COURT: All right. Thank you.

12 Ms. Lackman, any questions?

13 MS. LACKMAN: Are we going to do anything with the
14 photo? If I can take a look at it.

15 THE COURT: Can you look at it.

16 MS. LACKMAN: Can we open it up? Can we see the files
17 on the computer, see what was downloaded?

18 THE COURT: Sure.

19 (Pause)

20 BY MS. LACKMAN:

21 Q. Mr. Hayes, is that what you would have seen if you
22 downloaded the photo?

23 A. Something similar to that, yes.

24 Q. Does it contain any credit?

25 A. No.

18DAAMAN2

Hayes - Recross

1 THE COURT: Again, Mr. Hayes, before you downloaded in
2 that version, you had seen the entire photograph with
3 Mr. Mango's name on it; is that it?

4 THE WITNESS: I saw it --

5 THE COURT: The article.

6 THE WITNESS: -- the article, yes.

7 THE COURT: Yes.

8 Anything else?

9 MS. LACKMAN: Can we right click so that the Court can
10 see the metadata that's downloaded, so we can see the metadata.

11 (Pause)

12 BY MS. LACKMAN:

13 Q. Mr. Hayes, is that consistent with the process that you
14 went through to get Exhibit 77, to right click and then --

15 A. I believe the commands are slightly different on the MAC,
16 but I imagine what you just did, the process, is probably
17 synonymous with.

18 THE COURT: All right. Thank you.

19 MS. LACKMAN: And it has a created date of today.

20 THE COURT: All right.

21 BY MS. LACKMAN:

22 Q. One last question. I believe it was your testimony that
23 you didn't see Mr. Mango's name when you downloaded the photo.

24 A. Yes.

25 Q. Do you know whether what we're looking at today is exactly

18DAAMAN2

Hayes - Recross

1 what was up on The New York Post website in April of last year?

2 A. It's possible it's different.

3 Q. Is it possible that the gutter credit could have been added
4 later?

5 A. Yes, it's possible.

6 MS. LACKMAN: I have no further questions.

7 MR. FREEMAN: No further questions, your Honor.

8 THE COURT: Mr. Hayes, in your experience, how
9 frequent would it be for a newspaper article to contain a
10 photograph and not have the photographer's name?

11 THE WITNESS: I would say infrequent. It's possible
12 that in a breaking news setting that articles would be
13 published without photo credit and they might be added at some
14 point in the not-so-distant future after that.

15 THE COURT: All right. Mr. Freeman, Ms. Lackman, is
16 it possible to go back to April 11, 2017 and find the original
17 of The New York Post article showing whether or not Mr. Mango's
18 name was part of the gutter credits?

19 MR. FREEMAN: Is your Honor asking whether online or
20 in print?

21 THE COURT: Well, either one.

22 MR. FREEMAN: I believe that we can determine that.
23 There's a web archive that may indicate exactly the way that it
24 appeared as of April 11th of 2017. But we don't know if
25 there's a guarantee.

18DAAMAN2

Hayes - Recross

1 THE COURT: Well, let's make an attempt. New York
2 Post archives on that day containing the photograph as a
3 appears on Exhibit No. 13 or whether that photograph may have
4 been subsequently altered.

5 Mr. Hayes has testified that it is unlikely, but it
6 still leaves the possibility. He is still saying it is
7 possible that it may have been alter later on. Right?

8 MR. FREEMAN: Right. I understand we also have
9 deposition testimony from Mr. Mango which states that when they
10 asked him, they said did you check the gutter credit soon after
11 the article was published, because that is his customary
12 practice to do, to make sure that is there. It is very
13 important to Mr. Mango that his work is credited.

14 THE COURT: All right. Let's not --

15 MR. FREEMAN: We are getting ahead of ourselves. But
16 we will certainly look for web archive, yes.

17 THE COURT: Thank you, Mr. Hayes. You may step down.

18 (Witness excused)

19 THE COURT: Mr. Freeman.

20 MR. FREEMAN: Yes, your Honor. We have one more
21 witness, Mr. Mango.

22 Would you like to proceed now?

23 THE COURT: How long would Mr. Mango be on the stand?

24 MR. FREEMAN: Our side, I think it will be roughly 15
25 to 20 minutes. But I don't know how long Ms. Lackman will take

18DAAMAN2

Hayes - Recross

1 with Mr. Mango.

2 MS. LACKMAN: I just will observe that Mr. Brehm was
3 supposed to have been on the stand for 10 to 15 minutes. That
4 went a little longer.

5 THE COURT: Why don't we then break for lunch for one
6 hour and return at roughly at 1:20.

7 All right.

8 MR. FREEMAN: Thank you, your Honor.

9 (Luncheon Recess)

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18DAAMAN2

Hayes - Recross

A F T E R N O O N S E S S I O N

1:20 p.m.

THE COURT: Thank you. Be seated.

All right. Mr. Freeman, your next witness.

MR. FREEMAN: Yes, your Honor. Before calling the next witness we'd like to inform the Court that we were able to check on our cellphones for archives on Plaintiff's Exhibit 13, The New York Post article. We did locate the article.

I'm not sure how your Honor would like plaintiff to submit that evidence to the Court since we now have it on our cellphone. We could certainly go back to the office, take some screenshots of it, and submit it via fax. But I guess that depends on --

THE COURT: Can you summarize and stipulate to what you believe it depicts on the relevant issue of what the photograph contains with respect to the gutter credits as of the date that Mr. Hayes first saw it.

MS. LACKMAN: We're trying to pull it up now. Nothing is coming up. So I'm not sure I can stipulate to it.

My computer -- you said you had it on your cellphone.

MR. FREEMAN: Over lunch we pulled it up on his cellphone. So I suppose he could pull it up now.

Do you have your cellphone? We could pull it up right now and show the Court.

(Pause)

18DAAMAN2

Hayes - Recross

1 THE COURT: Let's get back on the record.

2 The status of that photograph as of the date that
3 Mr. Hayes first saw it.

4 MS. LACKMAN: I am prepared to stipulate that the
5 Wayback Machine shows that this is what was there. I'm not
6 prepared to stipulate the Wayback Machine's image or record is
7 correct. I can't verify that.

8 MR. FREEMAN: Just to clarify for the record that
9 Plaintiff's Exhibit 13, which shows The New York Post article
10 dated January 18th of 2017, that the internet shows that the
11 Wayback archive as of January 20, 2017, Gregory P. Mango's
12 gutter credit was included on the face of the article.

13 THE COURT: All right. So now we'll get into a
14 dispute about the accuracy of Wayback technology.

15 MS. LACKMAN: I hope we won't, but, your Honor, as a
16 matter of just professional obligation, I can't put my full
17 faith and credit on the Wayback machine.

18 THE COURT: You may then submit expert testimony about
19 the degree of accuracy of the Wayback technology, how
20 frequently it is inaccurate.

21 MS. LACKMAN: I hope not to have to do that, but I
22 would certainly hope to be able to reserve my right to do so.
23 I would certainly hate to agree and then come out and find out
24 that the front page of The New York Post says Wayback Machine a
25 fraud and then I've waived my rights.

18DAAMAN2

Hayes - Recross

1 Sorry to be technical, Judge, but I am taking too much
2 faith. It is just like relying on anything in Wikipedia. They
3 change every day, just because somebody decides to ambush the
4 page. So I don't know for certain. I haven't had a chance to
5 test it. I don't know if the Wayback Machine ever overlays, if
6 the findings are mostly similar, if they make caches later on.
7 I just don't know how it works in that detail.

8 So certainly if we believe that this is something
9 worth spending our energies on and that the case turns on this
10 point, we don't want to waive that opportunity. I would
11 probably be in trouble with my client if I did.

12 THE COURT: The case may not necessarily rest on this
13 point, Ms. Lackman, but Mr. Hayes' credibility certainly is
14 influenced by something like that. He has made some very
15 categorical statements about what was there and was not.

16 MS. LACKMAN: He said he did not see. I don't believe
17 he has said I can say for sure it was not there. He hasn't
18 said that. So we would not purport to say that he said it
19 wasn't there. It may have been there. We just don't know.

20 THE COURT: There is evidence on the record now based
21 on your stipulation that it was there on that date subject to
22 the accuracy of the technology.

23 MS. LACKMAN: My stipulation is that the Wayback
24 Machine says it was there on this day. The Wayback Machine is
25 an out-of-court speaker and to some extent hearsay not

18DAAMAN2

Mango - Direct

1 verified.

2 THE COURT: Mr. Freeman, anything else?

3 MR. FREEMAN: No your Honor.

4 THE COURT: Let's proceed then.

5 MR. FREEMAN: I'd like to call plaintiff's witness
6 Mr. Gregory P. Mango.

7 GREGORY P. MANGO,

8 called as a witness,

9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. FREEMAN:

12 Q. Hello, Mr. Mango. Thanks for appearing today.

13 What is your occupation?

14 A. I'm a photo journalist.

15 Q. How long have you been a photo journalist?

16 A. I started my professional business in May of 1992.

17 Q. And did you go to school for photography?

18 A. I did.

19 Q. Where was that?

20 A. Ithaca College.

21 Q. What year?

22 A. I graduated in May of 1987 with a bachelor of science in
23 cinema and photography.

24 Q. Where do you currently work?

25 A. I run my own business. Its called P3200 Photo Journalism.

18DAAMAN2

Mango - Direct

1 I have a variety of clients, and my main one of course is The
2 New York Post.

3 Q. Have you done freelance work with the New York Post?

4 A. I have.

5 Q. And how long have you been freelancing with The New York
6 Post?

7 A. I had one assignment sometime in probably June of 1998 for
8 the Mermaid Day Parade, which I did well with, but then I got
9 sidetracked with other clients and I didn't really go back to
10 get work from them until November of 2003. So basically we are
11 coming up on my 15-year anniversary.

12 Q. How many days week do you freelance with the New York Post?

13 A. I have been blessed to get roughly five days a week most
14 weeks. There are some weeks where I only get four days. On
15 occasion, maybe once or twice a year I'll only have three days.

16 Q. And how are you compensated by The New York Post?

17 A. Well, I am given a day rate, which consists of an
18 eight-hour shift, if you will. And of course that day rate is
19 very much different than any sort of licensing agreements that
20 I would ever negotiate with other media companies for two
21 reasons.

22 One, of course, is that when they hire me for a job
23 they don't know if I'm actually going to produce a photograph.
24 So there's an investment on their part money-wise that
25 hopefully I'll come up with something good that they can use,

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Mango - Direct

1 and there is an investment on my part that I'll find that image
2 and get it.

3 The second reason, of course, is that you don't know
4 the value of something that hasn't yet been created. So when
5 they give me a day rate, it's a relatively low fee mostly
6 because they're my main client and they get a discount for
7 employing me for like the last 15 years, but also there's no
8 way to determine what a photograph is going to be worth before
9 it's been created.

10 Q. And does the day rate that you earn for The New York Post
11 reflect the amount that you would charge another media
12 organization to use your photographs?

13 A. It does not.

14 Q. And why is that?

15 A. Other organizations that call me for photos would be asking
16 for a licensing agreement and there's whole bunch of factors
17 that are involved in those negotiations. I had mentioned four
18 during the deposition. Actually, the gentlemen from the law
19 firm mentioned a fifth. So those factors are -- which I agree
20 with him -- the factors are the size of company, how long they
21 want to use it, could be a single-day use, could be six months,
22 a year, could be in perpetuity.

23 The third factor would be which means that they wanted
24 to use it, and that could be television, internet or print, and
25 actually even radio now has a presence on the internet. So

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Mango - Direct

1 even a radio station might want to buy a photo to use on their
2 website. So that would be the third factor.

3 The fourth is the newsworthiness of the image, and of
4 course in this case there were multiple news outlets that did
5 do stories about Mr. Parker. There's a very interesting case
6 about discrimination because of his health issues. Preet
7 Bharara had to get involved on that case.

8 Then of course probably in some ways the most
9 important factor is the rarity, the fact that this image was
10 not available anywhere else.

11 MR. FREEMAN: Plaintiff respectfully refers the Court
12 to Plaintiff's Exhibit 13, which has been admitted.

13 Your Honor, may I have permission to approach the
14 witness?

15 THE COURT: Yes.

16 (Pause)

17 Q. Mr. Mango, do you recognize this document?

18 A. I do.

19 Q. What is the subject matter of this news article?

20 A. The subject matter is the lawsuit that was filed on behalf
21 of Raymond Parker for his, for the fact that the New York
22 Police Department rescinded a job offer after they had offered
23 it to him upon finding out that he is HIV positive.

24 Q. Who took this photograph?

25 A. I did.

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Mango - Direct

1 Q. When did you take it?

2 A. This was taken on January 18th of 2017.

3 Q. And underneath the photograph of Mr. Parker, is that your
4 name listed?

5 A. It is.

6 Q. Is it customary for The New York Post to list your name
7 under a photograph you take?

8 A. Yes, it is.

9 Q. Why is that?

10 A. Well, you know, I guess just from a personal point of view
11 you want to see your name in print. Writers have the same
12 thing. But more importantly, you know, when other news
13 organizations are interested in stories and they do scour other
14 websites for stories, if they want a purchase the photo they
15 know who to call and they know who to ask for. Many times I'll
16 get a call from someone and they'll tell me they got my phone
17 number from an editor at The New York Post.

18 Q. When this news article was published back a January of
19 2017, did you verify whether or not your name was included
20 below the photograph?

21 A. I did.

22 Q. And why did you make a inquiry?

23 A. I wanted to be able to make sure that I have credit so that
24 in case anybody wants to purchase the photo from me, they're
25 able to contact me, they'll know who to ask for.

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Mango - Direct

1 Q. Thank you.

2 MR. FREEMAN: Plaintiff respectfully refers the Court
3 to Plaintiff's Exhibit 20, which has been previously admitted.

4 Your Honor, may I approach the witness?

5 THE COURT: Yes.

6 (Pause)

7 Q. Mr. Mango, do you recognize this document?

8 A. I do.

9 Q. Is that your photograph of Mr. Parker?

10 A. Yes, it is.

11 Q. Did you authorize BuzzFeed to publish your photograph of
12 Mr. Parker?

13 A. I did not.

14 Q. Who is listed in the gutter credit?

15 A. It's Fisher & Taubenfeld.

16 Q. Who is Fisher & Taubenfeld?

17 A. I believe they're the law firm that represented Mr. Parker
18 in his federal lawsuit.

19 Q. How do you know that?

20 A. Based on the story that I read here, on this BuzzFeed
21 story.

22 Q. And did you authorize Fisher & Taubenfeld to publish this
23 photo?

24 A. I did not.

25 Q. Have you ever had communication with Fisher & Taubenfeld

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Mango - Direct

1 either before or after the date of this article?

2 A. No, I've never spoken with anybody from the firm.

3 Q. Who is Mike Hayes?

4 A. Mike Hayes is a reporter at BuzzFeed.

5 Q. Did Mike Hayes ever communicate with you prior to
6 BuzzFeed's publication of this photo?

7 A. He did not.

8 Q. What does exclusivity mean?

9 A. Well, it basically means that you have positioned yourself
10 in a situation where only you were able to obtain the photos
11 and there were no other journalists around to get the same
12 picture. So you have exclusive content that nobody else has.

13 Q. Is the photograph of Raymond Parker an exculsive
14 photograph?

15 A. It is.

16 MR. FREEMAN: Plaintiff would like to mark -- identify
17 Plaintiff's Exhibit 15.

18 Your Honor, we're anticipating an objection to the
19 production of this.

20 THE COURT: What number?

21 MR. FREEMAN: Plaintiff would request the Court leave
22 to respond to the objection.

23 THE COURT: Which document?

24 MR. FREEMAN: This is Plaintiff's Exhibit 15. If I
25 may have the Court's permission.

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Mango - Direct

1 THE COURT: Yes.

2 (Pause)

3 Q. Mr. Mango, do you recognize this document?

4 A. I do.

5 Q. How do you recognize it?

6 A. Well, I recognize it as a similar story to the one that The
7 New York Post published on Raymond Parker.

8 MS. LACKMAN: Objection. Hearsay.

9 MR. FREEMAN: Plaintiff respectfully posits to the
10 Court to admit Plaintiff's Exhibit and also requests the
11 opportunity to respond to Ms. Lackman's objection.

12 THE COURT: What's your response to the objection?

13 MR. FREEMAN: My response to the objection is that
14 Ms. Lackman maintains that this is hearsay. However, the case
15 law makes perfectly clear, although quotations from a news
16 article may be deemed hearsay, news article are admissible for
17 the fact that the statements did occur and were published.
18 That is Second Circuit authority. Shaft v. PLC British
19 Airways, 22 F.3d 59, at 64.

20 There's other citations as well indicating that news
21 articles may be proffered as background information of events
22 at issue. That would be Krause v. Buffalo and Eri County, 425
23 F. Supp. 2d 352 at 378 (W.D. 2006).

24 THE COURT: What is your theory of relevance?

25 MR. FREEMAN: The relevance of this is that what other

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Mango - Direct

1 news organizations published demonstrate the exclusivity of
2 Mr. Mango's photo and we believe that the exclusivity of
3 Mr. Mango's photo will impact the fair market value of how it's
4 measured.

5 THE COURT: Ms. Lackman.

6 MS. LACKMAN: First of all, we didn't receive a copy
7 of the bench memo so I don't know what authorities are being
8 cited. But I can tell you that on its face Mr. Mango has no
9 knowledge as to why or why not someone used a photograph in an
10 article. We don't have a witness from this publication to
11 testify as to why the photo was used or not used.

12 I think the evidence will show that nobody contacted
13 Mr. Mango to use the photograph. So I don't think this is
14 going to take us anywhere apart from down a line of
15 speculation.

16 MR. FREEMAN: Our response is that it's relevant and
17 not speculative. We're simply introducing this as evidence to
18 show the fact that there were other news articles and other
19 news organizations out there that were reporting on this story
20 and they used stock photos rather than photos of Mr. Parker.

21 It demonstrates -- and we will ask Mr. Mango did these
22 organizations contact him, but it certainly demonstrates,
23 number one, that it was a newsworthy story. This wasn't an
24 isolated incident of The New York Post reporting on it.

25 Number two, again, it impacts the exclusivity of the

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Mango - Direct

1 photo, demonstrating that other news organizations had the
2 option to license and didn't do so.

3 We believe that it's relevant. It certainly overcomes
4 the hearsay objection. I haven't heard Ms. Lackman respond to
5 that argument.

6 MS. LACKMAN: Well, I did respond to the hearsay
7 argument, your Honor. What I said was the fact that they are
8 trying to offer it for the truth that this was so exclusive,
9 that somehow the authors of these articles couldn't get it from
10 Mr. Mango or something like that. There's going to be some
11 conclusion that they want you to draw based on the fact that
12 the photo was used.

13 I think Mr. Hayes testified that you don't have to use
14 a photo of the subject and in fact, if one isn't available, you
15 won't. But no one contacted him. So I don't know where this
16 goes. The fact that this is a newsworthy story was already
17 testified to. Again, Mr. Mango has no foundational knowledge
18 to talk about these articles, what they say, why they were
19 published, why certain photos were used or not used. He has
20 absolutely no knowledge of that. So for him to testify to it
21 is classic hearsay.

22 THE COURT: Thank you.

23 Sustained.

24 BY MR. FREEMAN:

25 Q. Mr. Mango, I'd like to talk about your past licensed

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Mango - Direct

1 transactions.

2 A. Sure.

3 Q. How do you go about licensing your photographs to media
4 organizations?

5 A. Well, there are two primary ways that I do it. One is when
6 I am contacted directly, I will engage in negotiations, usually
7 over the telephone, sometimes e-mail, on what their needs are,
8 their budget, and what I'm looking for.

9 The other ways I would syndicate the photos is through
10 two different photo agencies. One is called Splash News and
11 the other one is Polaris.

12 Q. It is Polaris and Splash News, stock photo agencies. Are
13 those the only stock photo agencies that you've used in the
14 past?

15 A. Yes.

16 Q. If another media organization besides The New York Post
17 wanted to license a Raymond Parker photo from you, how would
18 you go about doing that?

19 A. I would -- well, usually they'd contact me. You know, they
20 usually get the phone number from one of the editors at The New
21 York Post and then they'll usually contact me. As I said, I
22 will find out how long they want to use it for. Is it just a
23 one-day, one-story use, one-time use, or do they want it in
24 perpetuity.

25 I remember I had licensed some photos on Andrew Madoff

18DAAMAN2

Mango - Direct

1 in the beginning of that investigation. They decided that they
2 might not need the photo of Andrew right away, that he may come
3 into play as the case moves forward. So that was one where I
4 believe that they got in perpetuity.

5 So yeah, the length of time. And if it is a print
6 publication, I'll ask if it's going to be a quarter page, half
7 page, full page, double page. That will be a second concern.
8 Of course I'll know pretty much right away how big the company
9 is just by the name of the company. If it is ABC or something
10 versus The Sky Valley news in Spokane, Washington, or
11 something, you can sort of tailor our fees to what the budget
12 is. Then of course the two factors I also mentioned,
13 newsworthiness and the rarity.

14 Q. In this case would a media organization be able to license
15 the Raymond Parker photograph through a stock photo agency?

16 A. No. The Raymond Parker photos were not syndicated. They
17 never left my computer. Only to be sent to The New York Post,
18 but I never sent them to Splash or Polaris.

19 Q. So a media organization could not license this photograph
20 to Splash or Polaris?

21 A. No.

22 Q. How about through Getty?

23 A. I've never given Getty any of my work.

24 Q. Did any media organization license the photograph of
25 Raymond Parker -- I'm sorry. Strike that.

18DAAMAN2

Mango - Direct

1 Did any other media organization contact you to
2 license the Raymond Parker photograph?

3 A. They did not.

4 MR. FREEMAN: Now, we'd like to mark, identify
5 Plaintiff's Exhibit 88.

6 Your Honor, may I have permission to approach the
7 witness?

8 THE COURT: Yes.

9 (Pause)

10 Q. Mr. Mango, do you recognize this document?

11 A. Yes, I do.

12 Q. And what does this chart show?

13 A. This shows various licensing fees for different media
14 organizations that I personally negotiated for the license fee
15 agreement.

16 MR. FREEMAN: Your Honor, plaintiff respectfully moves
17 the Court to admit Plaintiff's Exhibit 88.

18 MS. LACKMAN: We have no objection to this as a
19 summary to the extent it is complete true and accurate. He
20 hasn't testified to that at this point in time, but we do agree
21 that it potentially qualifies under Rule 106.

22 THE COURT: Admitted.

23 (Plaintiff's Exhibit 88 received in evidence)

24 Q. What's the date range here of the license transactions
25 indicated?

18DAAMAN2

Mango - Direct

1 A. Looks like the oldest one goes back to October 29th of 2005
2 and the most recent one listed here is from October of 2016. I
3 think they asked me to give them the 2006 to the present, but I
4 went one year further back and gave them from 2005 to the
5 present.

6 Q. And what's the highest fee you have received for a single
7 image through your own personal negotiations?

8 A. Looks like I've got two for the same dollar amount of \$750.
9 One from February 2nd of 2006 and one from February 18th of
10 2009.

11 Q. Now, was there any back-and-forth negotiations between you
12 and the media organization before you actually settled on these
13 dollar amounts?

14 A. Oh, there always is. They never want to give you what you
15 ask for in the beginning. The other thing is I also tell a lot
16 of photographers, they ask me, some of younger guys, ask me,
17 well, how do I go about doing this. A lot of times we'll shoot
18 five or ten different images for a story. We call it a
19 package. I often tell them that if you can mention these other
20 photos, cause maybe they will only see one photo published, but
21 there may be other relevant images. I often tell them, tell
22 the client that you've got other photos and that you will put
23 together a package with a discount price. So, for example, it
24 would be better to receive -- sell three photos at \$500 each
25 rather than one photo at \$750.

18DAAMAN2

Mango - Direct

1 Q. So when a media organization contacts you after seeing your
2 work published in The New York Post, what do you customarily
3 charge? In other words, what's your opening offer?

4 A. Well, it depends on who's contacting me. I would say that
5 in the case of the Raymond Parker photo, based on the fact that
6 it was a newsworthy event, large company, and extremely rare
7 photo, I would have made my opening bid at \$1,000.

8 Q. What's the lowest amount you've ever received for licensed
9 image where you personally negotiated the fee?

10 A. \$250.

11 Q. And what's the median for single images that you've
12 personally negotiated?

13 A. Looks to be close to \$500.

14 MR. FREEMAN: Plaintiff would like to mark for
15 identification Plaintiff's Exhibit 89.

16 Your Honor, may I have permission to approach the
17 witness?

18 THE COURT: Yes.

19 (Pause)

20 Q. Mr. Mango, do you recognize these documents?

21 A. Yes, I do.

22 Q. What are they?

23 A. These are invoices for various media companies that are
24 licensing agreements for them to use various photos that
25 they've seen in The New York Post.

18DAAMAN2

Mango - Direct

1 Q. And you've testified that P3200 Photo Journalism is your
2 company?

3 A. Yes it is.

4 Q. So did you personally prepare these invoices?

5 A. Every one of them.

6 MR. FREEMAN: Plaintiff respectful moves the court to
7 admit Plaintiff's Exhibit 88.

8 MS. LACKMAN: 89?

9 MR. FREEMAN: I'm sorry. 89.

10 MS. LACKMAN: No objection.

11 Q. Did each of the photographs described in these invoices
12 originally appear in The New York Post?

13 A. Yes, that's true.

14 Q. In each case did the media organization contact you
15 directly to obtain a license?

16 A. Well, as I said, I think in probably most of these cases
17 they probably called The New York Post first to get my phone
18 number, but then, yes, usually it was a phone call. Maybe in a
19 couple of cases it might have been an e-mail.

20 MR. FREEMAN: Plaintiff identifies Plaintiff's Exhibit
21 90.

22 Your Honor, may I have permission to approach the
23 witness?

24 THE COURT: Yes.

25 (Pause)

18DAAMAN2

Mango - Direct

1 Q. Mr. Mango, do you recognize this document?

2 A. Yes, I do.

3 Q. And what does this chart show?

4 A. Well, these are licensing fees that were obtained for me by
5 the two agencies I mentioned earlier, Splash and Polaris.

6 Q. These are the top 12 licensing fees that you received from
7 Polaris and Splash?

8 A. Yes, that's correct.

9 MR. FREEMAN: Plaintiff respectful moves to Court
10 admit Plaintiff's Exhibit 90.

11 MS. LACKMAN: We have an objection with respect to the
12 fact of whether it is a genuine summary. It is clearly a
13 cherrypicked group of the top 12 licenses. To the extent it
14 summarizes those, we have no objection. But to the extent it
15 attempts to summarize his whole license history, we of course
16 object.

17 THE COURT: Overruled.

18 (Plaintiff's Exhibit 90 received in evidence)

19 BY MR. FREEMAN:

20 Q. Mr. Mango, what's the date range of your transactions that
21 are listed on this chart?

22 A. Looks like the oldest one would be from October of 2007 to
23 November of 2012.

24 Q. And what's the highest licensing fee you've received for a
25 single image through a stock photo agency?

18DAAMAN2

Mango - Direct

1 A. That would be the number one entry, which is the \$2500,
2 which was a story I remember very well about a home invasion in
3 New Britain, Connecticut, where a doctor was held hostage in
4 the basement while his family was killed by two thieves and
5 then the house was set on fire.

6 THE COURT: Mr. Mango, going back to the exhibit. I
7 am looking at number five.

8 THE WITNESS: On Exhibit 90?

9 THE COURT: Yes.

10 THE WITNESS: Yes, sir.

11 THE COURT: What's the date there?

12 THE WITNESS: Oh, I'm sorry. I was missed that one.
13 Yeah. It's mistake. I'm sorry. The newest one is from March
14 of 2015.

15 MR. FREEMAN: Thank you, your Honor.

16 THE WITNESS: Sorry about that.

17 Q. And did you personally negotiate the licensing transactions
18 that are listed on the chart? Did you personally negotiate
19 these yourself?

20 A. I did not.

21 Q. They were negotiated on your behalf, right?

22 A. Yes.

23 MR. FREEMAN: Plaintiff marks for identification
24 Exhibit No. 91.

25 Your Honor, may I have the Court's permission to

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Mango - Direct

1 approach the witness?

2 THE COURT: Yes.

3 (Pause)

4 Q. Mr. Mango, do you recognize these documents?

5 A. Yes, I do.

6 Q. And how would you describe them?

7 A. These are, Polaris is calling them sales statements and
8 Splash is calling them sales reports. They're basically
9 summaries of images that I had syndicated to them to sell on my
10 behalf. They represent the amount that they charged and then
11 the amount, I think in the case of Polaris I am getting
12 50 percent, and Splash I guess I am getting 50 percent. It
13 shows what they sold it for plus my part of the payment.

14 MR. FREEMAN: Plaintiff respectfully moves the Court
15 to admit Plaintiff's Exhibit 91.

16 MS. LACKMAN: I have no objection.

17 BY MR. FREEMAN:

18 Q. Mr. Mango, did you personally prepare these invoices?

19 A. I did not.

20 Q. Do you know what factors determine the price negotiated by
21 a third-party stock photo agency on your behalf?

22 A. I don't know how they do it. They have a giant sales force
23 and probably some of them have a lot more experience than me.
24 I'm sure they do a better job than I do. But no, I don't have
25 firsthand knowledge about how they go about doing the sales.

18DAAMAN2

Mango - Cross

1 Q. In April of 2017 had BuzzFeed contacted you and asked you
2 to license the Raymond Parker photograph, how much would you
3 have charged?

4 MS. LACKMAN: Objection. This is not about evidence.
5 It is about speculation.

6 THE COURT: Overruled.

7 A. As I had mentioned earlier, based on the size of the
8 company, the newsworthiness of the photo and the rarity of the
9 photo, my opening ask would have been \$1,000.

10 Q. How much would you have accepted?

11 A. Well, it's something I can't answer and that we'll never
12 know because Mr. Hayes made the decision not to pick up the
13 phone and call me and work out some kind of negotiations.

14 MR. FREEMAN: No further questions, your Honor.

15 THE COURT: Ms. Lackman.

16 CROSS-EXAMINATION

17 BY MS. LACKMAN:

18 Q. Mr. Mango, did you make a decision not to pick up the phone
19 and call BuzzFeed to obtain a retroactive license?

20 A. No, I did not make a decision.

21 Q. You chose to sue instead?

22 A. You know, I work for The Post about 50 hours a week and it
23 had been brought to my attention that the Liebowitz law firm
24 would be a very good help for me to track images that were
25 being stolen on the internet.

18DAAMAN2

Mango - Cross

1 So in August of 2016, I signed a retainer with the
2 Leibowitz law firm to have them do all of that work. Not only
3 finding the images that may have been infringed upon, but also
4 doing all the registration work. This is stuff that I do not
5 have the time to do. So it was really just a question of sort
6 of delegating some of work of keeping track of my intellectual
7 property to someone who has expertise in the area.

8 Q. So are you saying that because you have an agreement with
9 the Liebowitz firm you could not have approached BuzzFeed to
10 get a --

11 A. I'm not saying that. I'm saying that in terms of
12 infringements -- let's remember now this is after the fact.
13 This is not during the time of the publication of BuzzFeed.

14 After the fact I was notified about this and I left it
15 to my legal representation to, you know, take care of it one
16 way or another, whether it be a settlement or a lawsuit.

17 Q. Are you responsible for -- did your firm -- but nobody ever
18 reached out to discuss settlement, correct? No one ever
19 reached out to BuzzFeed to talk about settling the case before
20 it was filed?

21 A. Of course, we went to settlement conference together. You
22 and I were there.

23 Q. After the lawsuit was filed. I am talking about prior to
24 the filing of lawsuit.

25 A. I didn't call BuzzFeed, no, I did not.

18DAAMAN2

Mango - Cross

1 Q. Are you responsible for the filing fees for this case?

2 A. I am.

3 Q. You say you are a photo journalist. Do you ever write
4 articles?

5 A. I have.

6 Q. Have you done it for pay?

7 A. Yes.

8 Q. How many publications?

9 A. I have had less than half a dozen articles published in The
10 New York Post, probably three or four, and before that I did a
11 lot of work for a chain of newspapers in Brooklyn called The
12 Brooklyn Papers. Probably, again, maybe less than half a dozen
13 stories that I wrote as well.

14 In those cases I generally do the photography as well.
15 I can remember one I did The Brooklyn Papers on a holocaust
16 designer who became a painter at the age of 77 and these went
17 wonderful images of his time in Buchenwald.

18 Q. Were you paid a day rate from The New York Post when you
19 wrote articles?

20 A. Yes.

21 Q. OK. And you said that you worked an eight-hour shift when
22 you worked for The Post?

23 A. Well, the day rate that I negotiated with the director of
24 photography would include eight hours. Of course most of these
25 stories, especially if you start to gather information late in

18DAAMAN2

Mango - Cross

1 the day, you usually go beyond the eight hours, in which case I
2 have an hourly add on.

3 Q. On this day that you took the photos of Mr. Parker, how
4 many photos did you provide The Post?

5 A. I can't give you an exact amount, but I usually try and
6 give them somewhere between 7, 15. So I'm going to guess,
7 somewhere maybe between eight and ten.

8 Q. How many did they use?

9 A. I know they used one on January 18 and then a slightly
10 different one on April 11th. So at least two. There may have
11 been more. The two I am sure of. There are two that I am sure
12 of I should say.

13 Q. Those were taken on the same day?

14 A. They were.

15 Q. At the same day rate?

16 A. Yes.

17 Q. How much were you paid?

18 A. That was a normal day. It was 11 a.m. to 7 p.m., and I was
19 paid \$300.

20 Q. Did The Post pay you a separate license fee for using the
21 photos, publishing the photos in their articles?

22 A. Can you repeat that question?

23 Q. Sure.

24 In addition to the day rate of the \$300, did they then
25 pay you a separate license fee for using the photographs of

18DAAMAN2

Mango - Cross

1 Mr. Parker in those articles?

2 A. You are referring to subsequent articles?

3 Q. The article in January and then the one in April, did they
4 pay you a license fee?

5 A. In other words, you are asking, they paid me once in
6 January, did they pay me again a April for the same photo. Is
7 that what you're asking?

8 Q. Well, they paid you on the day -- for your work on the
9 photos?

10 A. Yeah.

11 Q. Did they pay you a separate license fee to use either or
12 both of those photos in actual articles subsequently?

13 A. I was paid once, January 17.

14 Q. OK. So when you work at the day rate and provide photos,
15 The Post -- tell me if this is incorrect -- the price that's
16 paid on a day rate gives them a license to use the photographs?

17 A. It's in the contract.

18 Q. Let's look at the contract really quickly. I have the
19 binder. Exhibit B is a contract between you and The New York
20 Post and I'd like to see if you recognize it. Can you take a
21 look.

22 A. I do.

23 Q. What is it?

24 A. It's my freelance photographer independent contractor
25 agreement.

18DAAMAN2

Mango - Cross

1 MR. FREEMAN: I would like to move that Exhibit B be
2 admitted into evidence.

3 THE COURT: Didn't you say this morning that all of
4 the defendant's exhibits in the binder were not objected to?

5 MR. FREEMAN: Yes. So I would say it's not a question
6 of that I'm objecting to the admissibility. I just wanted to
7 state that this was produced by The New York Post pursuant to a
8 protective order. So to the extent that it could be filed
9 under seal to honor that protective order, we would move to do
10 so.

11 MS. LACKMAN: We have no objection with that.

12 THE COURT: Proceed.

13 Q. If you could please turn to the section on the third page,
14 it's section six that says "credit."

15 Do you see that?

16 A. Yes.

17 Q. And do you see the first line that says, "Publisher will
18 usually reasonable efforts to five freelancers credit for each
19 published work?"

20 Do you see that?

21 A. Yes.

22 Q. Is a reasonable effort acceptable to you?

23 A. I signed the contract.

24 Q. OK. Why didn't you negotiate for a one hundred percent
25 compliance standard?

18DAAMAN2

Mango - Cross

1 A. This was the contract that was presented to me. I did get
2 some complaints from other photographers about some of terms of
3 the contract. I advised them to sign the contract and to go on
4 with it because we -- unfortunately, it's not 1950. There's
5 not 25 newspapers. So at the time there was three main
6 newspapers in the city -- The Times, The New York Post and New
7 York Daily News. Of course, now we found out two weeks, three
8 weeks ago that the entire photography staff was fired. So
9 there was even less opportunity to, if you're unhappy with the
10 contract, you go somewhere else. So there's no union to
11 negotiate contracts. So it was basically a take-it-or-leave-it
12 situation. So I took it.

13 Q. So if they make a mistake or they forget, it is your
14 understanding that you have a breach of contract?

15 A. I haven't run across that situation.

16 Q. Is that because you check every photo that they publish?

17 A. It would -- I can't check every single one, but I haven't
18 had any problem.

19 Q. I think you mentioned earlier that you did in this
20 circumstance, you did check. How do you know when a photo of
21 yours is used by The Post?

22 A. I go onto the website and look for the story.

23 Q. They don't alert you of that?

24 A. No.

25 Q. Do you check The Post everyday?

18DAAMAN2

Mango - Cross

1 A. Absolutely. Probably check it seven, eight, maybe ten
2 times a day.

3 Q. When you see a situation where they haven't used a credit,
4 do you notify them?

5 A. Absolutely.

6 MS. LACKMAN: I'd like to mark -- not mark. I'd like
7 to show the witness what was previously marked Plaintiff's
8 Exhibit 17.

9 I am assuming that plaintiff has no objection, but if
10 I can please present it to the witness.

11 THE COURT: Yes.

12 (Pause)

13 Q. Mr. Mango, I am showing you what's been previously marked
14 as Exhibit 17. It is double-sided in case you haven't seen
15 that.

16 Have you seen this before, this article?

17 A. Yes.

18 Q. OK. And can you briefly tell me what it is.

19 A. This is a followup article to the first story that was done
20 in January, and I guess it's a news story that talks about the
21 fact that Mr. Parker was successful with his lawsuit and that
22 he was given, I believe, retroactive pay of \$85,000 and he got
23 his job back.

24 Q. If you could please turn to --

25 MS. LACKMAN: Actually, first, let me move to have

18DAAMAN2

Mango - Cross

1 this admitted into evidence.

2 I assume the plaintiff has no objection.

3 MR. FREEMAN: No objection, your Honor.

4 Q. If you could please turn over to the back of the --
5 backside of the page, which is continues at the top "I
6 represent to you."

7 Do you see the image on the upper left side of the
8 page?

9 A. Yes.

10 Q. Where is your photo credit here?

11 A. I don't see one.

12 Q. Did you contact The Post about it?

13 A. No.

14 Q. Why not?

15 A. Because when you click on -- this is a hyperlink. And when
16 you click on this image or the text that's underneath it, it
17 brings you to the original story that has my photo credit.

18 Q. So it's not a problem if the photo credit is missing if you
19 can click somewhere and find the photo with the credit?

20 A. Well, don't forget that the top of the story has my name
21 right on it, same guy with the same clothes.

22 Q. But is it possible that someone else could have come in
23 after you and taken this picture of him?

24 A. I guess it's possible, but I knew it was my photo.

25 Q. Would the outside observer know that that was your photo?

18DAAMAN2

Mango - Cross

1 A. Well, I mean, if they see the picture of a guy sitting on a
2 couch with a red jacket on and flip it over and see the exact
3 same outfit and same couch, they could probably put two and two
4 together and figure out that's my photo.

5 Q. Can you tell from the big image that he is sitting on a
6 couch?

7 A. Say that again.

8 Q. Does he appear to be -- how do you know that he is sitting
9 on a couch?

10 A. Cause I took the picture.

11 Q. How would anyone else know?

12 A. I don't know.

13 Q. Could it be a selfie?

14 A. Yeah. I guess so. You usually see the person's arm, but
15 I'm not an expert of selfies. I am terrible at selfies. I
16 always let my girlfriend do them. I always mess them up.

17 Q. OK. We talked earlier about the metadata in this case. I
18 am sure you recall.

19 A. Yes.

20 Q. Why do you allow The New York Post to not include your name
21 in the metadata to the photos that they use?

22 A. Well, first of all, I very rarely look at metadata. What
23 I'm concerned with is when I work on these photos, before I
24 send them in to The New York Post, I have to write a caption
25 and that caption is extremely important. I try to fill it up

18DAAMAN2

Mango - Cross

1 with a lot of proper nouns. So that it could be months, years
2 later, people could type in a certain phrases and find these
3 photos.

4 In that caption my name is in three different spots.
5 It is in the actual description where I write caption, it is in
6 the origin above, and then it's in the third spot, in a
7 different field. I can't remember the name of it. But that's
8 where I'm concerned with having my name next to the photo
9 captioning.

10 Q. So this is information that is provided to The Post?

11 A. It is attached to the photoshop file. So when they go into
12 their meetings to discuss layout and stuff, it will print out
13 black and whites of the images and at the bottom will be the
14 box with my caption and my name.

15 Q. But that's not provided to the public?

16 A. The caption is sometimes transcribed by the people doing
17 the layouts. They will actually take a sentence or two out of
18 my caption and write it. So I guess you could say part of it's
19 put under the photo, but maybe not every little detail.

20 Q. Sometimes not at all.

21 A. Sometimes they just put the name of the person, like what
22 we have here.

23 Q. Have you ever signed a contract that assigns all rights to
24 someone else, giving up the copyright rights?

25 A. I have not.

18DAAMAN2

Mango - Cross

1 Q. Are you aware that this is possible?

2 A. Sure. My friends at the Daily News signed away their
3 rights.

4 Q. OK. Have your friends at the Daily News signed away their
5 rights to get credit?

6 A. I don't know.

7 Q. Are you aware of any circumstances where a creator of a
8 copyrighted work might sign away their rights to get credit?

9 A. Probably someone just starting out in the field. I could
10 see a young kid just coming out of school who has never been
11 published before getting very excited about trying to build a
12 portfolio, and in that case they might sign away their rights
13 to get the photo credit so they could go to, you know, a
14 portfolio of tear sheets with their name on it to sort of build
15 their career that way. That could be possible.

16 Q. Just so it's clear on the record, did anyone else contact
17 you to use the photographs at issue in this case?

18 A. No. I wish they had. I could have used the money.

19 Q. Do you know whether anyone contacted The New York Post to
20 use the photo at issue in the case?

21 A. I do not know.

22 Q. If someone had contacted The Post, would they tell you?

23 A. Absolutely.

24 Q. But you are aware that -- strike that.

25 Are you aware of any third party using the photograph

18DAAMAN2

Mango - Cross

1 without permission in any kind of news article?

2 A. You mean other than BuzzFeed?

3 Q. Right.

4 A. I'm not aware of anybody else using it.

5 Q. I want to talk briefly about some factors that you were
6 discussing and get some clarity there.

7 A. OK.

8 Q. So one thing you talked about was the media type.

9 A. Yeah.

10 Q. And do television licenses tend to be the highest rate?

11 A. I'd have to take a look.

12 You want me to talk about the Splash and Polaris. I
13 probably shouldn't because I don't know how they work, but I
14 can talk about my own.

15 Q. Just in your experience. You said that the type of media
16 makes a difference. So I'm assuming you have some
17 understanding as to how that makes a difference.

18 So I'm trying to find out, do you know what types of
19 media tends to carry higher rates?

20 A. It takes a lot of money to run a television station, so
21 generally they are going to be bigger companies. It's not so
22 much the media as it is the size of company.

23 But if you want to make the parallel that television
24 because they are big they tend to command more money, I would
25 agree with that. Sure.

18DAAMAN2

Mango - Cross

1 Q. Do books carry a higher rate than internet use?

2 A. I wouldn't say -- based on my own limited experience, I
3 only sold to a book publisher a couple of times. They are in
4 the range. They're in an average range. They are not super
5 high, they are not super low.

6 Q. We will go into this in a little more detail perhaps.

7 You have considered the frequency of use, right? I
8 think you said something like one-time length of user or
9 one-time user or something like that.

10 A. Yeah. If you look at my agreements, almost all of them say
11 one-time use.

12 Q. What does one-time use mean to you? I just want to
13 understand, do you mean use for one article or one type of use
14 or do you mean use for one day? What does that mean?

15 A. It would be one article, yeah.

16 Q. OK. So that means, for example, with the Post, they are
17 engaging in -- let's talk about a hypothetical article. I
18 think your photo was used twice.

19 If I read an article and there is your photo as a
20 one-time use, it can stay on the internet forever, right?

21 A. That one article, yes.

22 Q. Another thing you talked about was rarity of image.

23 A. Yes.

24 Q. Just to clarify your testimony, when you say rarity, I
25 think you said that it's rare if it's an image that isn't

18DAAMAN2

Mango - Cross

1 available elsewhere; is that what you meant?

2 A. Generally it means that you are the only photographer at a
3 particular place and time to capture a particular image that
4 once that event passes, they cannot be recreated.

5 Q. In your experience, has more than one photographer taken
6 the same photograph?

7 A. Imagine Stormy Daniels walking into federal court with
8 Michael Avenetti. You've got maybe 10 to 12 print media out
9 standing by the U.S. Marshals by 500 Pearl, you've probably got
10 another five or ten television stations, also making sure that
11 there isn't chaos and pandemonian because it does get kind of
12 rough out there. I've been knocked to the ground a number of
13 times. So sure, you've got people who are elbow to elbow and
14 they are going to press that button at the exact same time and
15 basically they are going to create the same photo.

16 Q. If I wanted to take a picture myself of Mr. Parker sitting
17 on his couch this afternoon, theoretically could I do that?

18 A. Of course.

19 Q. So Mr. Parker, then, it's fair to say, it wasn't a
20 circumstance where there was a large crowd of people inside a
21 room and they are all taking pictures at the same time?

22 A. No. I was the only one there.

23 Q. Because him sitting on his couch is not a particularly
24 newsworthy event.

25 A. The story was newsworthy and we were hot on the story and

18DAAMAN2

Mango - Cross

1 we wound up scouring East New York -- I know we went to at
2 least two addresses; we may have gone to a third one -- to find
3 this man and do this storey.

4 Q. But in terms of rarity, is a rare photo that nobody wants
5 to license worth as much as a semi-rare photo that everybody
6 wants to license?

7 A. A rare photo is something that only one photographer has
8 and, if you're lucky, a lot of people want to license it.

9 Q. But in this circumstance not a lot of people wanted to
10 license this photo, did they?

11 A. I wasn't contacted by anybody else. But in terms of the
12 rarity of the photo, yes, no one else has -- by the way, no one
13 even knew where the guy lived to even send their own
14 photographers.

15 For example, CBS, rather than using cop cars, which is
16 a generic picture of the cop cars in Times Square, if they
17 wanted to go ahead and actually get this particular subject
18 matter, they would have had to put some time and money, they
19 would have had to hire a photographer and spend the money to do
20 that, as well as a writer.

21 We looked for this guy for a couple of hours before we
22 even found him. Just finding the guy is part of the equation.

23 Q. Right. You were with a reporter from the New York Post,
24 correct?

25 A. Yes.

18DAAMAN2

Mango - Cross

1 Q. And her assignment was to do a story about Mr. Parker,
2 correct?

3 A. Yes.

4 Q. And this was The New York Post's idea, right?

5 A. Well, it actually came from this building. We have a
6 federal court reporter who covers cases all the time. She had
7 found the filing of the lawsuit. I believe it was that day.
8 So I believe it was January 18. And we jumped right on it.

9 I was on the police scanner in the morning and I think
10 around two o'clock they found the first address, which turned
11 out to be a bad address. But you go to one address, they're
12 not there, but then you speak to somebody who knows an aunt who
13 lives in the next building over. Then you go see her and, oh,
14 he is over now at another address on Park Avenue or wherever.
15 That is how that unfolded.

16 Q. Right. It wasn't you deciding to write a story about
17 Mr. Parker?

18 A. It was not me, no.

19 Q. So if you didn't find Mr. Parker, The Post wouldn't have
20 written a story about him?

21 A. I can't answer that. I'm pretty sure they would write a
22 story either way.

23 THE COURT: Excuse me. I think that this questioning
24 is becoming, one, cumulative; two, thinly relevant; and three,
25 largely speculative.

18DAAMAN2

Mango - Cross

1 MS. LACKMAN: I wanted to talk about some of the
2 factors that went into it, but I think we have covered some of
3 them at least.

4 Q. Let's talk about your licensing provisions a little bit.

5 A. OK.

6 Q. And some of exhibits that you were shown.

7 A. OK.

8 Q. Is the subject of a photograph relevant to the licensing
9 fee that you charge?

10 A. Is the subject relevant?

11 Q. Yeah. Does it affect the price?

12 A. Again, if it is a rare subject that is not often
13 photographed and it is newsworthy, it will affect the price.
14 Of course.

15 Q. If a photograph depicts a well-known celebrity, the
16 licensee would be on it, right?

17 A. Well-known celebrities are photographed all the time. You
18 can take one case I remember -- I wish it was me -- the
19 photographer found Paul McCartney with his new girlfriend, I
20 think was out in the Hamptons somewhere, and nobody else had
21 the picture. So he got a lot of money for that.

22 How many pictures of Stormy Daniels, whatever it is,
23 lots of pictures of her. So I can't tell you what each photo
24 would be worth, and I don't know if it is wise to sort of make
25 the generalization that because they're a celebrity you are

18DAAMAN2

Mango - Cross

1 going to get more money.

2 Q. I wanted to go back to your testimony in your deposition
3 regarding Jeffrey Epstein.

4 A. Yes.

5 Q. Is it correct that the photograph you took of him and that
6 you were talking about at the deposition was worth a lot
7 because he is hard to find in public?

8 A. As far as I can remember, and we are going back to I think
9 it was 2011, I think he had just gotten out of prison. So he
10 hadn't been seen for quite some time. He may have been
11 photographed a lot before he was in prison. I don't know what
12 the prison term was. If my memory is correct, he had more
13 recently just got out of prison and come up from Florida. So
14 yeah.

15 The other thing, of course, is he was very, very good
16 friends with the Duke of York, Andrew Ferguson I believe is his
17 real name. So in Europe, for example, especially in England,
18 the picture was well sought after. I think I sold to the
19 Telegraph, perhaps to the Guardian.

20 Q. And you described Jeffrey Epstein as notorious, right?

21 A. Did I use that word?

22 Q. I think you agreed to that term.

23 A. Notorious?

24 Q. Notorious.

25 A. If I used the word, then I used the word. I don't know a

18DAAMAN2

Mango - Cross

1 lot about him. I probably shouldn't have used that word.

2 THE COURT: Ms. Lackman, please, I'm asking you to
3 move this testimony along. I think this is getting to be
4 tiresome.

5 MS. LACKMAN: Yes. I am going to go through the
6 exhibits that he spoke about.

7 Q. Is there anything else that we haven't discussed today that
8 you take into account in licensing a photo?

9 A. Well, it all sounds very neat and organized and systematic
10 when I lay out the five factors, but at the end of the day you
11 can make these arguments to the clients and, you know,
12 sometimes they say, well, look, we have a budget of \$500, take
13 it or leave it. So that kind of throws everything out the
14 window.

15 So from that point of view, yes, the factors are
16 relevant, but, you know, it is not guaranteed that you are
17 going to get it. Just because you say, well, it's a rare photo
18 and it is newsworthy you are a giant company doesn't mean you
19 are going to necessarily get what you'd like.

20 Q. Let's go to Plaintiff's Exhibit 88.

21 A. Got it.

22 Q. Is it fair to say that most of these are -- in fact, none
23 of these are internet-only licenses?

24 A. Well, I didn't actually create this document, but I trust
25 that Mr. Freeman did a fine job at putting this together.

18DAAMAN2

Mango - Cross

1 So whatever it says it says. So you've got TV, you've
2 got all media, print, internet. I don't see anything here
3 that's just internet.

4 Q. Well, isn't it the case that the \$500 print and internet
5 license which was due to the Globe Magazine was not for the
6 internet at all?

7 A. I have to look at that agreement. Give me one second.

8 Globe?

9 Q. Yes. In 406.

10 THE COURT: OK. What's the question?

11 Q. That that's a print use.

12 A. It says here, sales for one-time use only in Globe
13 Magazine. Future usage to be negotiated at that time. Photo
14 credit to be given. Whatever possible is copyrighted, has not
15 been transferred, November 26, 2005. Right. So maybe that
16 might be a mistake on the summary.

17 Q. OK. Let's look at, there's another on the summary chart
18 that referenced, license from March 24, 2013 where you
19 negotiated a print/internet license for \$250, is that right?

20 A. Which number that?

21 Q. The one ending in 638.

22 A. 638.

23 Q. Sorry. 629.

24 A. OK. Got it.

25 Yes. Build digital, German outfit.

18DAAMAN2

Mango - Cross

1 Q. So \$250, would it be fair to say that if we take Exhibit 88
2 to be all personally negotiated licenses since 2005 that the
3 highest internet licenses you've received is \$250?

4 A. Well, the paragraph about usage says -- it is a one-year
5 license starting on March 24, 2013 and ending on March 24th of
6 2014. I granted them permission to publish and print or on the
7 web -- I am not sure if they have a print edition of their
8 website -- one image.

9 Q. So you are not sure?

10 A. Well, I mean it actually says print and internet.

11 Q. OK. And print licenses tend to be higher other than online
12 licenses, correct?

13 A. Well, a lot of -- almost every news organization that has a
14 print edition also has a web presence. So you kind of can't,
15 you kind of -- they're usually looking to get both when you
16 make the negotiations.

17 Q. Right. But my question was do print licenses tend to be
18 higher than online licenses.

19 A. I don't have any experience to answer that question.

20 Q. Have you only negotiated 15 licenses on your behalf since
21 2005?

22 A. Yes.

23 Q. And this is reflective of -- so we're talking on this
24 document, Exhibit 88, we're talking about a total of 20 images,
25 right?

18DAAMAN2

Mango - Cross

1 A. 20, yes.

2 Q. So if I've done the math right, that's an average of
3 \$417.50 per image for images you've negotiated yourself?

4 A. OK.

5 Q. You don't dispute that?

6 A. It's pure math. I can't dispute it.

7 Q. Good. Some might try.

8 And it's true, is it not, that you've never personally
9 negotiated an internet-only license with any party?

10 A. Not from this chart, no.

11 Q. From your recollection.

12 A. Again, most of these have internet presence, especially --
13 even going back to 2005, the internet was pretty much up and
14 running by then. So there's always an internet component.

15 Q. Right. That's why I said an internet-only license.

16 A. I don't see that here, no.

17 Q. So you can't be sure, but you could have negotiated a
18 license with BuzzFeed yourself, correct?

19 A. I could have definitely have negotiated a license with
20 BuzzFeed. Of course I could.

21 Q. It would have been your first time.

22 A. It wouldn't have been my first negotiation.

23 Q. No. It would have been your first time negotiating an
24 internet-only license.

25 A. OK.

18DAAMAN2

Mango - Cross

1 Q. Yes?

2 A. Yes, yeah.

3 Q. You talked about exclusivity and non-exclusivity, and I
4 believe you said that exclusivity means that only one
5 photographer has the image.

6 A. Yeah.

7 Q. Doesn't exclusivity mean -- well, do any of these
8 agreements that you identified in tab 89 refer to exclusive or
9 non-exclusive?

10 A. 89?

11 Q. Yes. Do any of these tell the licensee that they are
12 exclusive?

13 A. Well, let's see.

14 Q. Isn't it the case that you cannot give someone an -- that
15 the term exclusive refers to how many outlets have that image
16 as opposed to how many photographers have taken that image?

17 A. Well, I think it could be both. I generally think of it is
18 as the intellectual property of one person. But I can tell you
19 that, like in years past when I had given the work to both
20 Splash and Polaris, a lot of times they would ask me not to
21 give it to the other agencies so they could sell it as
22 exclusive.

23 So in that case, yes, it would be the outlet or the
24 photo agency that could say to their magazines or whatever, we
25 have these exclusively from Greg Mango, but they're acting on

18DAAMAN2

Mango - Cross

1 my behalf. So they are kind of the same.

2 Q. So if you were licensing photographs that previously
3 appeared in the New York Post, you could not give an exclusive
4 license to another party, correct?

5 A. It's good question. Well, I could tell them that, well,
6 obviously you saw it in the New York Post so you know it is in
7 there, but it isn't with any photo agencies so it's not going
8 to go to any other publications. So from that point of view
9 exclusive -- excluding, I should say, excluding The New York
10 Post I can make that statement, sure.

11 Q. Let's look in Exhibit 89, first license.

12 A. Yes.

13 Q. Does it say that this one was in The New York Post
14 previously?

15 A. It does not say that, but the producer who called me got my
16 phone number from the New York Post.

17 Q. So Exhibit 89, I understood your testimony to reflect
18 licenses of photographs that had already been in The New York
19 Post, right?

20 A. Yes.

21 Q. OK. Let's then turn to the three or four pages in. At the
22 bottom it says MANG0423?

23 A. Yes. Got it.

24 Q. Do you see the Re line at the top?

25 A. Yes, I see that.

18DAAMAN2

Mango - Cross

1 Q. What publication is referenced there?

2 A. New York Magazine.

3 Q. Is that a mistake?

4 A. I don't believe. I think that they told me that they saw
5 it in New York Magazine, but it was originally published in The
6 New York Post.

7 Q. How do you know that?

8 A. How do I know it was originally published in the New York
9 Post?

10 Q. Um-hmm.

11 A. Because I saw it published in The New York Post. It is a
12 great story, an amazing story. I worked on this story for
13 about a year. Big trial.

14 We had gotten exclusive access. This was a new
15 funeral director who had taken over a place in Bensonhurst and
16 set up a secret autopsy room in the funeral home. During the
17 transition from the old funeral director to the new one, we had
18 gotten access to this room where he was taking --

19 THE COURT: Mr. Mango, I'm going to again ask you to
20 move along. This has no bearing whatsoever on this.

21 A. Yes. It was originally published in The New York Post.

22 Q. Let's move on to Exhibit 90, which we were talking about
23 earlier.

24 A. OK.

25 Q. Before we move on from agency licensing, you mentioned

18DAAMAN2

Mango - Cross

1 something that you had engaged in discussions over the
2 telephone. Do you remember that?

3 A. I'm sorry. I had engaged in telephone discussions?

4 Q. Yeah, with the licensee when you directed the negotiations.

5 A. Yeah, usually they call me.

6 Q. Have you ever given permission to someone over the phone to
7 use the photo and say you are going to follow up with an
8 invoice?

9 A. Once we have an agreement, it's usually in writing because
10 what has to happen is I have to send them the images after we
11 talk on the phone. So I'll create an e-mail and I'll attach
12 the images. In that e-mail it'll have the general agreement,
13 the dollar amount, stuff like that. And then usually at the
14 bottom I'll say I'm sending an invoice to you tonight or
15 something like that.

16 Q. When you say agreement, are you referring to types of
17 documents we saw in Exhibit 89 or something else?

18 A. What's the question?

19 Q. When you said you'll send them an agreement when you send
20 them a photograph --

21 A. An invoice.

22 Q. So this is essentially an example of what you sent?

23 A. Yeah, these invoices.

24 Q. I didn't know if there were other documents.

25 A. No, just the invoice.

18DAAMAN2

Mango - Cross

1 Q. Has anyone ever -- have you ever sent the invoice
2 subsequently to sending the photos?

3 A. Have I sent the invoice when?

4 Q. After you sent the photos.

5 A. Depending on how much free time I have, I could attach the
6 invoice at the same time as the photo. But usually the invoice
7 is sent after I send the photo because they are usually on a
8 deadline to get this stuff printed right away and I don't want
9 to waste their time with me having to create an invoice. So I
10 would say that definitely a number of times the invoice is sent
11 after the photos are sent.

12 Q. OK. And so you're paid after the party uses the photo?

13 A. I mean, I try and get paid within 30 days.

14 Q. Exhibit 90.

15 A. Yes.

16 Q. This is summary of the 12 highest license fees negotiated
17 by third-party stock photo agencies on your behalf.

18 A. Yes, it is.

19 Q. Why is it just 12? Why not ten or 15?

20 A. I didn't create that document. This was created by
21 Mr. Freeman.

22 Q. Is it fair to say that if a license you've earned through a
23 third party is not on this list, the fee was lower?

24 A. I don't know.

25 Q. What does top 12 mean in your understanding?

18DAAMAN2

Mango - Cross

1 A. I guess it's just sort of to show what I have been able to
2 command for photos over these years.

3 Q. I'll note that there appears to me to be only one internet
4 license referenced on this cart. Is that correct?

5 A. That's what it says.

6 Q. And in 2015 there is a license fee in the amount of \$750.
7 Do you see that?

8 A. Yes.

9 Q. Do you recall the underlying photograph this corresponds
10 to?

11 A. I would take a wild guess that it is Jeffrey Epstein, but I
12 couldn't be sure.

13 Q. If you wanted to take a look at Exhibit 91 at page 438,
14 which is five or six pages in, does that refresh your
15 recollection?

16 A. Yes, and I was correct, it's Jeffrey Epstein.

17 Q. Was this a popular photograph?

18 A. Yes.

19 Q. Do you know how many times this was licensed?

20 A. No.

21 Q. Do you have a rough estimate?

22 A. 15 times.

23 Q. OK. Did you receive \$750 each time it was licensed?

24 A. I don't believe so.

25 Q. Did you receive \$750 when it was licensed that one time?

18DAAMAN2

Mango - Cross

1 A. Yes.

2 Q. The photo agency didn't take a cut?

3 A. I am sorry. It was sold for seven. Let's be clear that
4 these numbers here are what the photos were sold before, not
5 what I received on the chart of 12.

6 Q. What did you receive in that instance?

7 A. I get 60 percent. So I got \$450 for that one.

8 Q. And if you look at page -- basically this royalty
9 statement, which includes the Jeffrey Epstein images, there's
10 reference to 438 and 439 on it.

11 Do you see a variety of licenses?

12 A. Yes, I do.

13 Q. And did you receive \$450 for each of these uses?

14 A. No, no. All different amounts. There was only one sale on
15 March 2nd of 2015. The Jeffrey Epstein photo was sold for \$750
16 and I received 450. The other photos were sold for different
17 amounts.

18 MS. LACKMAN: I am going to move on to another exhibit
19 in just a moment.

20 (Pause)

21 Q. In your experience when a photo agency acts on your behalf
22 to license the photo, has any licensees ever questioned the
23 authority of the agency to act on your behalf?

24 A. I have no idea.

25 Q. Has anyone ever contacted, any licensee contacted you and

18DAAMAN2

Mango - Cross

1 said, hey, is Splash or Polaris your agent?

2 A. I have had e-mails from news organizations asking me does
3 your agency, do they have these photos or do I have to get them
4 directly from you.

5 Q. OK. But nobody has ever called you up and said, hey, I was
6 talking to Splash and I'm not sure, are they legit? Have you
7 had any conversations like that?

8 A. No, I haven't.

9 Q. OK. Let's look in the binder at Exhibit L.

10 A. OK.

11 Q. Do you have any understanding of how many documented
12 licenses you provided to us as part of this litigation?

13 A. Well, I know that I gave Mr. Freeman the paper documents
14 that I found from Splash and Polaris in my office, plus my own
15 personal licensing agreements, plus anything I could find from
16 older years of financial records in my motor cycle garage.
17 Then I think I found about, I don't know, 60 or 70 PDFs from
18 Splash that were on my computer, which I also forwarded to
19 Mr. Freeman. Each one of those probably had five or ten images
20 on it. So I really -- hundreds of licenses.

21 Q. OK. About 330? Would that sound about right?

22 A. Sounds like you did the math. I have no idea. But if you
23 counted them, then I'll go with it.

24 Q. OK.

25 MS. LACKMAN: Looking at Exhibit L, I would like to

18DAAMAN2

Mango - Cross

1 move for the admission of this into evidence under Rule 1006
2 rather than providing 330 licenses to the Court.

3 THE COURT: This exhibit was in your binder?

4 MS. LACKMAN: Yes.

5 THE COURT: The agreement was anything in the binder
6 was admitted.

7 MS. LACKMAN: OK. Just making sure.

8 THE COURT: Yes. Let's take a ten-minute break.

9 (Recess)

10 THE COURT: You may be seated.

11 Ms. Lackman, let's get a bearing on time and on
12 relevance.

13 MS. LACKMAN: Yes. I'm going to go through Exhibit L
14 and wrap this up.

15 THE COURT: How long?

16 MS. LACKMAN: 20 minutes, 15 minutes, being realistic.
17 This is not a Mr. Freeman 20 minutes. This is a real 20
18 minutes.

19 THE COURT: Let's take the 20 minutes and that will be
20 it.

21 BY MS. LACKMAN:

22 Q. Let's look at this document marked as Exhibit L. We
23 discussed this is a summary provided under a rule that allows
24 us to summarize voluminous documents.

25 Do you have any reason to believe just sitting here

18DAAMAN2

Mango - Cross

1 now that the summary is not accurate?

2 A. Well, it's thirteen pages of licensing agreements. I would
3 need hours to go over this to tell you if it's accurate. But I
4 would just assume that barring any mistakes that whoever input
5 this, I'll accept it as accurate.

6 Q. Thank you. The judge has only begin me 20 minutes, so
7 thank you for saying that.

8 So if we have over 300 licenses here and you are
9 showing us 15 licenses for 20 photographs you negotiated plus
10 the top 12 you negotiated that was in Exhibit 90, is it fair to
11 say that this exhibit is somewhat more comprehensive of your
12 licensing history?

13 A. I would say that it's really not relevant because I didn't
14 negotiate these licenses and I don't know the inner workings
15 and mechanics of how Splash and Polaris works. So it's
16 something that I don't have a lot knowledge to comment on.

17 Q. So you're saying the only licenses that are relevant are
18 the 15 that you negotiated?

19 A. I am saying those are the only ones I can talk about.

20 Q. Are you aware what you've received from your licensing?

21 A. Yes, of course.

22 Q. OK. Let's look at the Epstein image briefly. Would you be
23 surprised if I told you the Epstein image has been licensed
24 approximately 65 times?

25 A. It's more than I would have guessed.

18DAAMAN2

Mango - Cross

1 Q. That's more than you would have guessed?

2 A. I think I said 15 earlier.

3 Q. Let's look at the first page. In the second category of
4 the second box, you'll see sort of midway through there are
5 four entries to Jeffrey Epstein.

6 Do you see that?

7 A. Yes.

8 Q. And do you see the last one you received \$450 for that use.
9 Is that correct?

10 A. Yes.

11 Q. And then previous to that, if you look up to the first
12 reference, four lines up, there's reference to popsugar.com.
13 Same licensee. \$24.

14 Do you see that?

15 A. I do.

16 Q. How about with respect to the Daily Beast, you received \$30
17 for use of that same photo, correct?

18 A. Yes.

19 Q. These are all internet-only photos?

20 A. That's what it says.

21 Q. OK. And so aren't these numbers in the 20 to 30 dollar
22 range, isn't this a little bit more typical of what you receive
23 for a non-subscription internet use?

24 A. Again, I don't know how they make their sales and I don't
25 know what their parameters are. Basically for me it's whatever

18DAAMAN2

Mango - Cross

1 they send me, that's what I accept. So I can't tell you what's
2 typical and what's not.

3 Q. If you look at the second column of the second box category
4 at the bottom, you see there's a total average there.

5 A. Yes, I do.

6 Q. Do you have any reason to dispute that the average license
7 fee that you've received for non-subscription use, for internet
8 use, is \$51.14?

9 A. That's what they negotiated.

10 Q. And did you ever go back to them and refuse your royalty
11 statement?

12 A. Of course not.

13 Q. Did you ever go back to them and say I want \$450, not \$30?

14 A. No.

15 Q. Let's look at the top box. In the first part there's a
16 reference to Petit Gravesite Flowers.

17 Do you see that?

18 A. I do.

19 Q. This was for a book use, correct?

20 A. That's what it says.

21 Q. And you earned \$475 in connection with that?

22 A. For, it looks like an eighth of a page. I guess the cover
23 of a book.

24 Q. Who is William Petit at the time?

25 A. He is the gentleman I described earlier. He was a doctor

18DAAMAN2

Mango - Cross

1 in New Britain, Connecticut. Him and his family were subject
2 to a home invasion. The wife and daughters were killed and
3 then they burned the house down.

4 Q. I actually remember that.

5 A. It was a big one.

6 Q. And is this the same photograph you licensed to People
7 Magazine for \$2500?

8 A. No, it's not. This was the photograph of the grave. I was
9 there for two days in New Britain. I took some time to drive
10 around the town and find the cemetery where the two girls and
11 the mom were buried. So that was a photograph of the
12 gravesite, freshly dug gravesite. I believe there was some
13 flowers near the graves.

14 Q. So you licensed a photo of Mr. Petit, Dr. Petit himself at
15 the memorial service for his family. Is that true?

16 A. The picture of him?

17 Q. He was probably deceased.

18 A. No, no. He survived. The only one who survived.

19 There was a number -- like I say, sometimes these
20 stories have multiple pictures to illustrate the story. So
21 there was a picture of him that was used on the cover of the
22 New York Post. I think that was the picture that was used in
23 People Magazine where they sold it for \$2500. I am pretty
24 sure.

25 Q. Picture used on the cover, you mean in print?

18DAAMAN2

Mango - Cross

1 A. When I first did it for The New York Post, yes, they used
2 it in print and I'm sure they put it on the web as well.

3 Then afterwards it was given to Splash and Polaris and
4 they went out and sold it. And if I'm not mistaken, the
5 picture of Dr. Petit himself was used it in People Magazine.

6 THE COURT: I am going to stop again, Ms. Lackman.
7 Beyond the point that you made that the average of all of these
8 is something like \$52, what more is relevant?

9 MS. LACKMAN: Not much if I've made the point.

10 THE COURT: He has now spent ten minutes telling us
11 about pictures in Connecticut which is neither here nor there.

12 MS. LACKMAN: Well, I'm trying to focus on what the
13 direct covered and trying to work through that. If that's been
14 covered, then we're good.

15 Q. Just to clarify, did the picture of Mr. Parker at issue in
16 this case ever appear in The New York Post in print, Mr. Parker
17 in print?

18 A. I don't know. I think so, but I couldn't be sure.

19 THE COURT: Ms. Lackman, what relevance does that have
20 to the issue in this case?

21 MS. LACKMAN: It has relevance to the calculation of
22 damages and what is reasonable.

23 THE COURT: You have already put on the record that
24 the average is \$52 and it ranges from 2500 to 3000 to 50,000.

25 MS. LACKMAN: Your Honor has a fair point.

18DAAMAN2

Mango - Redirect

1 And just to ask my last question.

2 Q. Given this rate, even given your opening offer, did you
3 receive BuzzFeed's offer of judgment for \$2500?

4 MR. FREEMAN: Objection, your Honor.

5 THE COURT: Sustained.

6 MR. FREEMAN: You don't have to answer.

7 THE WITNESS: OK.

8 MS. LACKMAN: No more questions.

9 MR. FREEMAN: Your Honor, I have one question.

10 THE COURT: Yes.

11 REDIRECT EXAMINATION

12 BY MR. FREEMAN:

13 Q. Mr. Mango, can you look at Plaintiff's Exhibit 89, Bates
14 stamp number MANG416. It's the fourth page. It's the one that
15 says ABC News?

16 A. Yes, I have it.

17 Q. Do you see that?

18 A. Yes.

19 Q. This was for \$750?

20 A. That's right. That's right. That's correct.

21 Q. This included internet?

22 A. Yes.

23 MR. FREEMAN: Thank you.

24 No further questions, your Honor.

25 THE WITNESS: OK.

18DAAMAN2

Mango - Recross

1 RECCROSS EXAMINATION

2 BY MS. LACKMAN:

3 Q. This is a document stamped Mango 416, correct? Is that
4 what Mr. Freeman asked you about?

5 A. Yes, ABC News.

6 Q. And can you please read the territory of the scope that's
7 provided or the permission scope?

8 A. Yes. It says, worldwide and all media now known or
9 hereafter devised.

10 Q. You can stop there.

11 In your understanding, does all media now known or
12 hereafter devised, does that include more than just the
13 Internet?

14 A. Well, the media is listed in that sentence.

15 Q. Okay.

16 MS. LACKMAN: So I have no further questions.

17 THE COURT: Let me ask Mr. Mango a couple of
18 questions.

19 THE WITNESS: Sure.

20 THE COURT: You testified about the instances, which
21 appear to be about a dozen or so, over the years in which you
22 directly negotiated a license for one of your photographs with
23 one of the sources.

24 Tell us generally how those negotiations went. You
25 said that usually they are media calls and you get on the

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Mango - Recross

1 phone, right?

2 THE WITNESS: Yes.

3 THE COURT: So then what happens.

4 THE WITNESS: Well, you know, they usually compliment
5 me and say we really like the work you're doing on a piece on
6 this and we would really like to have them in the story or TV
7 show or in print, and then I start to ask them some questions
8 about it.

9 THE COURT: You go through your five factors.

10 THE WITNESS: Five factors. I ask them do they have a
11 budget, stuff like that. You know, I throw out some numbers.
12 I also try to sell more than one photo cause, as I said
13 earlier, it is better to get three at 500 than one at 750. So
14 I try to push them as sort of the bulk discount. And they are
15 not easy negotiations. When I went to photography school, I
16 wasn't trained to how to be a salesman. So they are tough
17 because they want to chisel you down.

18 THE COURT: Generally, how long would it take for you
19 to conclude a deal, if you do conclude it?

20 THE WITNESS: You know, usually I don't talk -- the
21 first phone call is usually not a person who can sign off on
22 it. So usually they'll say, OK, I've got to talk to my
23 producer and get back to you. So usually it's two phone calls.

24 THE COURT: OK. How long does it take you to go to a
25 producer and get approval?

18DAAMAN2

Mango - Recross

1 THE WITNESS: Usually it's done the same day.

2 THE COURT: Same day.

3 THE WITNESS: Oh, yeah, cause everything's on a time
4 schedule.

5 THE COURT: You also indicated that you generally work
6 50 hours a week for The Post.

7 THE WITNESS: Maybe between 45 and 50, you know, on
8 the days when I work five days. Four days would be less.

9 THE COURT: You being a photographer I assume you
10 don't sit at a desk all day long.

11 THE WITNESS: No. I'm in my car all day usually.

12 THE COURT: Except if somebody calls you, when might
13 you be able to talk to them?

14 THE WITNESS: Well, it depends on if I'm in between
15 assignments, I could talk to them right then and there
16 sometimes. I'll have to -- you know, the problem is they want
17 the stuff right away. So I kind of have to make time for them.
18 Even if I am in the middle of an assignment, I have to make a
19 five-minute phone call. But it really depends on what
20 assignment I'm on.

21 THE COURT: So if somebody is on a tight deadline and
22 you are out in the field, they may or may not be able to get to
23 you or if they get you, it might take time before you can get
24 back to them and get approval. Is that a fair statement?

25 THE WITNESS: Yeah.

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Mango - Recross

1 THE COURT: And if they have half an hour, is that
2 enough time generally or is it possible it could take longer?

3 THE WITNESS: For them to get back to me?

4 THE COURT: No. For the whole transaction to be
5 completed.

6 THE WITNESS: Is a half-hour accurate?

7 THE COURT: No. I am just saying in your experience,
8 would that be enough time or does it generally take longer?

9 THE WITNESS: I would say half the time -- I would say
10 that probably 70 percent of the time we concluded it in a half
11 hour. Maybe 30 to 40 percent of the time we have to wait to
12 see to hear back from somebody up above to approve it. And
13 there are times when I don't get a return phone call and they
14 just drop the whole thing. They don't want to pay. That
15 happened to me last weekend. I gave the guy some numbers and
16 they --

17 THE COURT: How often have you had a situation like
18 this one where one of four photographs gets used without your
19 permission?

20 THE WITNESS: Oh, gosh. I mean, throughout my career?

21 THE COURT: Yes.

22 THE WITNESS: Hundreds of times.

23 THE COURT: It happens.

24 THE WITNESS: It's rampant. I mean, when -- I've
25 known Anthony Weiner and Chuck Schumer for decades. When

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Mango - Recross

1 Anthony Weiner had his problems, I had taken some pictures of
2 him. I just did a search -- this is before I was working with
3 the Leibowitz firm. I had no representation and I had Anthony
4 Weiner, 57,000 websites had the photo and I wasn't paid from
5 57,000 websites for them. I was maybe paid from 50 of them.

6 THE COURT: Generally to what would you attribute the
7 fact that it's so rampant? Is it possible that it's rampant
8 because the reporters want to get the story out and they don't
9 want to bother with having to track you down and spend the time
10 negotiating?

11 THE WITNESS: I think that's definitely part of it. I
12 also think ever since the advent of the internet we have a
13 situation where they're doing publishing, but they don't
14 necessarily set aside a budget for it. So that puts
15 constraints on them as well. You see this all the time where
16 other websites will use content and are not paying the
17 reporters to go out. They'll take the story from The New York
18 Post, put the hyperlink, and say it's fair use. Then maybe not
19 use a photo or steal one. And, you know, certain publications
20 that are paying photographers are losing that ad revenue. At
21 the end of the day what happens is the entire staff gets fired.
22 That is what happened to the Daily News a couple of weeks ago.

23 THE COURT: All right. Thank you. That's the end of
24 my questions unless counsel have followups.

25 MR. FREEMAN: No, your Honor.

18DAAMAN2

Mango - Recross

1 MS. LACKMAN: I have just a couple of questions, just
2 to clarify a couple of things.

3 BY MS. LACKMAN:

4 Q. In 15 years, is it fair to say that in 15 years you've
5 negotiated photo licenses directly 15 times?

6 A. Yes.

7 Q. OK. So the vast majority of your licensing is done by
8 photo agencies?

9 A. Used to be. Not any more, but used to be, yeah. I don't
10 use them anymore.

11 Q. Are there other -- when you were talking about other uses
12 of photographs, we're not talking about this photograph, are
13 we? No?

14 A. Can you repeat question?

15 Q. Sure. When you were talking with the judge about the uses
16 of the photograph, of your photographs, you weren't talking
17 about this photograph, right, being widespread and all that?

18 A. I'm not sure what part of the conversation you are
19 referring to.

20 Q. Sure.

21 Right at the end you were talking about web sites that
22 have your photos on them for which you were not paid.

23 A. Oh, right. Yes.

24 Q. Did this happen in the context of this particular
25 photograph, the one at issue in this case?

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Mango - Recross

1 A. I was not paid for that photograph, no.

2 Q. Did they appear all over the Internet?

3 A. This photo, not that I know of.

4 Q. Are the uses you were talking about primarily done by U.S.
5 companies that have a couple -- have more than a few employees?
6 I am trying to understand what you're getting at with the
7 widespread usage.

8 A. I mean, a lot of these websites, crazy names, small
9 operations, you read the title of the website, you don't -- I
10 mean, I remember one example where the title of a website had a
11 curse word in the title and it was, I believe it was just a
12 single person sort of blogging from their house. That would be
13 one extent. And then of course the other extreme would be big
14 companies that want it on their website. It could vary.

15 MS. LACKMAN: Just one moment.

16 (Pause)

17 MS. LACKMAN: No further questions.

18 THE COURT: Thank you. You are excused. You may step
19 down.

20 THE WITNESS: Thank you.

21 (Witness excused)

22 THE COURT: Mr. Freeman.

23 MR. FREEMAN: Yes, your Honor. Well, we've concluded
24 our presentation. We thank the Court for investing substantial
25 resources and court staff or entertaining this case on trial.

18DAAMAN2

Mango - Recross

1 The last thing we want to do is impose further paper
2 on the Court. That being said, there was a venerable goldmine
3 of testimony today that we would like to process and, if it
4 pleases the Court, to submit at the appropriate time and under
5 whatever parameters the Court selects, to submit a proposed
6 posttrial brief. It could be something like a single-spaced
7 letter brief or it could be a 10- to 15-page brief if it
8 pleases the Court.

9 THE COURT: What about a mini-closing argument?

10 MR. FREEMAN: You'd like a closing argument?

11 THE COURT: Yes. Let's do that, unless Ms. Lackman
12 has anything else.

13 Do you rest as well?

14 MS. LACKMAN: Yes. We're don't have any more on our
15 case. We believe we put in our case in chief in conjunction
16 with this.

17 THE COURT: All right. Then let's hear closing
18 arguments.

19 MR. FREEMAN: Your Honor, I believe in a typical trial
20 the defendant goes first and the plaintiff goes last.

21 MS. LACKMAN: From what the Court has heard today, we
22 have a couple claims in the case. The first claim in the case
23 is infringement under Section 501 of the Copyright Act. It's a
24 strict liability tort. As your Honor is aware, without a
25 license or other type of defense, my client is technically

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Mango - Recross

1 liable for copyright infringement.

2 We heard Ms. Fisher today deny that she had the
3 authority to give permission to use the photograph in The Post.
4 We did not uncover any evidence to believe otherwise.
5 Accordingly, BuzzFeed is liable.

6 That said, the amount of damages in this case for this
7 claim is extremely low. Mr. Mango conceded and did not dispute
8 that even in cases of non-subscription uses, which would be the
9 case here and is typically higher, the average license fee
10 would be \$51.14. In this district courts have looked at, in
11 determining statutory damages, even in cases of non-innocent
12 infringement or willful infringement some sort of small
13 multiplier of a reasonable license fee.

14 In this case a reasonable license fee may have been
15 lower than \$51, but let's say it was. The courts in this
16 district apply three to five times of a reasonable license fee,
17 and this is particularly in some instances generous under the
18 circumstance, as I will explain.

19 There is also a minimum if statutory damages are
20 claimed, and we are not disputing that they're claimed.
21 There's a minimum of \$750. So even if the five times
22 multiplier were applied, we are talking about \$250. The uplift
23 is \$750. That is actually what the parties were advised as an
24 initial inclination at a conference before this court back in
25 December. We believe that there shouldn't be an award higher

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Mango - Recross

1 than \$750 given these circumstances.

2 Relatedly, there's this Section 1202 claim of the
3 Copyright Act, which relates to the removal of copyright
4 management information. This one involves a high burden to
5 show -- the plaintiff is required to establish, they have the
6 burden of proof to establish that copyright management
7 information was removed intentionally, and not only that, that
8 the reason for the removal was in order to conceal infringement
9 or to facilitate other infringement.

10 The law was enacted essentially to prevent people from
11 damaging encryption systems and other types of things that were
12 being used to protect works over the Internet.

13 Mr. Hayes was not -- first of all, he didn't remove
14 anything. He downloaded a photo and the gutter credit didn't
15 come with the photo. Whether he saw it or not or overlooked it
16 or was confused, he reached out. He sought permission. We
17 believe that Ms. Fisher did give permission and is now walking
18 it back. Unfortunately, we don't have that in an email. But
19 even so, he wasn't trying to conceal anything. He thought he
20 had permission to use the photograph. He said if he didn't
21 have permission, he would have used something else. His
22 testimony on that point is very credible.

23 So the fact that he went ahead and did this and used
24 this shows his good faith. In addition, he linked to the
25 original article that included the photograph just like The New

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Mango - Recross

1 York Post did when they linked to the original article that had
2 featured that photograph without the use of gutter credits.
3 Mr. Mango testified that if you click on the link, you'll see
4 the original photo. If you click on The New York Post article,
5 you'll see the original photo.

6 If Mr. Hayes was trying to hide the use, he did a
7 really bad job by leaving a link to the original source. And
8 he did give a credit. He gave a credit to what he thought was
9 the source.

10 This falls very far short of establishing liability
11 for a copyright management information claim under Section 1202
12 of the Copyright Act and, therefore, the concept of damages,
13 the door shouldn't even be opened.

14 It's clear what happened here. Whether it was a
15 mistake or whether there was misunderstanding or whether
16 Ms. Fisher really did say OK. Mr. Hayes clearly did what he
17 thought was the right thing. He credited the source, the
18 source that he was able -- that he got the photo from. He
19 believed that Ms. Fisher had given the photo to The Post
20 originally. Mr. Mango could have been an employee of The Post.
21 Nobody really knows. But that level of diligence is also not
22 common, not standard, not expected and, most importantly, it
23 doesn't rise to the level of a willful calculating attempt to
24 violate someone's rights.

25 Mr. Hayes is a writer himself. He has seen those

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Mango - Recross

1 violations to himself. He has never been in trouble, never had
2 a claim over the thousands of photos he's written. He is not
3 the type of bad guy that should be implicated by Section 1202.
4 Therefore, that second claim should be dismissed.

5 Accordingly, the value of the case, the total damages
6 that should be awarded is \$750 and liability should not be
7 entered on any additional claim other than that's been
8 stipulated.

9 THE COURT: Thank you.

10 Mr. Freeman.

11 MR. FREEMAN: Thank you, your Honor. Well, the first
12 issue on Count One is willfulness. In evaluating willfulness
13 the courts will look at several factors, including whether the
14 infringer was on notice that the copyrighted work was
15 protected, whether the infringer had received warnings of the
16 infringement, whether the infringer had experience with
17 previous copyright ownership, prior lawsuits regarding similar
18 practices or worked in an industry where copyright a prevalent.
19 That is the Morel case, 934 F. Supp. 2d 547.

20 Here, there is no dispute that BuzzFeed works in an
21 industry where copyright is prevalent. There is no dispute
22 that BuzzFeed has had extensive experience with copyright
23 ownership and licensing photographs. There is no dispute that
24 BuzzFeed has guidelines for handling copyright ownership and
25 properly attributing photographs.

18DAAMAN2

Mango - Recross

1 Mr. Hayes testified that he has written over a
2 thousand articles. He's been an employee of BuzzFeed for seven
3 years. He's been a senior reporter for five and a half years.

4 Mr. Brehm testified that there are written internal
5 memorandum, which, by the way, we asked for in discovery and
6 didn't get, which instruct the employees of BuzzFeed how to
7 properly license photographs and how to properly attribute
8 photographs.

9 The BuzzFeed employee implicated in infringing Mango's
10 copyright here, Mr. Hayes, was aware of those guidelines. He
11 testified that he had been trained. He testified that he had
12 received internal memorandum. He clearly did not follow those
13 guidelines.

14 Furthermore, there could be really no question that at
15 the very least he acted in reckless disregard of Mr. Mango's
16 rights. That is all we have to show for willfulness. Granted,
17 the degree of willfulness is important here in terms of
18 calculating damages, but I think there's no question that we
19 we've met the threshold of showing that Mr. Hayes wanted a
20 photograph of Raymond Parker, he wanted it fast -- if you may
21 recall, the sooner the better -- and he wanted it for free
22 cause. He asked Ms. Fisher, who had no prior experience in
23 licensing photographs or distributing press kits or
24 distributing press releases to, quote/unquote, share a
25 photograph with him. He didn't say do you have a photograph to

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Mango - Recross

1 license, he said would you share it.

2 He never got a response. So what does he do? He goes
3 to The New York Post website. He downloads the picture from
4 the website. He cannot possible, it's not credible that he
5 didn't see the gutter credit. This is what he does everyday
6 for a living. This is how he makes his living. He writes
7 articles, sources photos, and he credits the photographer.

8 We had walked through at least two photographs from
9 other articles he had published in which he did input the
10 credit of the name of the photographer. So he understood what
11 he was doing. But here is the kicker. If the Court were to
12 look back at the pretrial submissions of defendant in this
13 case, they argue in their pretrial submission that Mr. Hayes
14 was justified in believing that he had authority from Fisher &
15 Taubenfeld because he had a past practice of receiving press
16 kits from lawyers and attorneys. But when he took the stand
17 today, he didn't even know what a press kit was. He testified
18 that he had never received a press kit from any attorney or
19 lawyer. That in and of itself undermines his credibility on
20 the issue.

21 Furthermore, with respect -- so in the sense of
22 establishing willfulness, we've certainly met our evidentiary
23 burden, and there could be no question that Mr. Hayes working
24 on behalf of BuzzFeed acted in reckless disregard. In fact, it
25 was above reckless disregard; it was willful.

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1 Now in terms of damages on Count One, you've seen the
2 defendant submit their chart which summarizes averages. They
3 have been talking all about averages. They asked Mr. Mango
4 what is the average. No where since the Copyright Act has been
5 enacted in 1976 have I found a single case where a court of law
6 determined the fair market value based on an average. In fact,
7 it's quite the opposite.

8 The Second Circuit ruled that an award of actual
9 damages in a copyright infringement case "should be broadly
10 construed in favor of victims of infringement." That's Davis
11 v. Gap, 246 F.3d 152.

12 William Packard, copyright law -- in fact, it is a
13 treatise -- says: "Within reason, any ambiguity should be
14 resolved in favor of the copyright owner. Thus, when a court
15 is confronted with imprecision in the calculation of
16 damages" -- and to be sure here there is a degree of
17 speculation because Mr. Mango never actually licensed the photo
18 to a third-party organization -- that "it should err on the
19 side of guaranteeing the plaintiff a full recovery." That is a
20 Second Circuit case, Sigma Photo News, 778 F.2d 89.

21 Furthermore, Fitzgerald Public Company v. Bailer
22 Publishing Company, 807 F.2d 1110. Quote: Actual damages are
23 not narrowly focused.

24 So we're looking -- and one more point on Davis v.
25 Gap, which is the Second Circuit's sort of benchmark case on

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1 how to calculate licensing fees.

2 Very revealing language where they say that the fee --
3 that the fair market value licensing is the licensing fee the
4 owner was entitled to charge for the infringer's use of the
5 copyrighted work. I think that's the best language I've found
6 so far to say entitled to charge. It's not necessarily what he
7 would have settle for; it's what would he have been quoted
8 reasonably. What was he entitled to charge if BuzzFeed had
9 picked up the phone and called him and said we'd like to get a
10 license.

11 Mr. Mango testified it's thousand dollars. We see
12 evidence on the record that it's plausible. He could have
13 gotten more. He could is gotten up to 2500. It's likely
14 implausible he would have settled for anything less than 750
15 given that he has a past of licensing internet on that basis.

16 So in terms of calculating the lost licensing fee,
17 number one, we don't that is dispositive. But if we're going
18 to include that as one of the factors, we don't know what it
19 would have been. But we know that something between 750 on the
20 low end, of the 2500 on the high end, something in between is a
21 reasonable licensing fee. So that's in terms of a metric for
22 calculating the fair market value.

23 Now, in terms of the multiple, there's no dispute that
24 there has been a traditional custom and practice in the last
25 three to four years, going back five years of using this

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1 multiple of three times five. Your Honor asked Mr. Mango on
2 the stand, what's going on here, why are these copyright
3 infringement cases so prevalent, why has the Liebowitz law firm
4 alone filed over 850 of these types of suits, and will probably
5 hit a thousand lawsuits by the end of this year. Of course,
6 it's certainly that you have digital publishers who are not
7 following the law. But there is an argument to make here that
8 perhaps the three times five licensing fee is not sufficient
9 deterrence.

10 I recognize that your Honor noted in the order on the
11 motion in limine that the courts that have used three times
12 five licensing multiple, that the courts have concluded that
13 that's a sufficient deterrent. But it seems to me that the
14 floodgates of litigation have opened. So perhaps it is not the
15 sufficient deterrence that is needed.

16 Just to give a simple metaphor, you know, the price
17 for riding the New York City subway is 2.75. But if you jump
18 the turnstile, it's a hundred dollar fine. That is a 36 times
19 multiple.

20 What would happen if the multiple was only three
21 times. What if it was six bucks or eight bucks if you get
22 fined. Would there be a lot more fare jumpers? I think that
23 we can answer that in the affirmative.

24 So we're suggesting, and it's not the first time it
25 has been suggested, that an ideal multiple, particularly when

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1 you are talking about breaking news photography or,
2 quote/unquote, lower value copyright cases is to apply a bit
3 more after hefty multiple, somewhere in the range of 10 to 12,
4 which we believe is adequate. After all, the number 12 is the
5 number of one full cycle. It is the number that represents
6 what goes around comes around.

7 I understand that your Honor might be reluctant to
8 break with the existing judicial custom and practice, but part
9 of this case -- I think I expressed this to your Honor since
10 the beginning -- is to perhaps redefine the parameters here and
11 to impose a more substantial penalty on infringers,
12 particularly those who are large-scale media companies,
13 large-scale corporations. Because after all, this case is not
14 just about BuzzFeed. It's in a sense a broken window case,
15 which mean if you left one broken window unrepaired in the
16 neighborhood, pretty soon you are going to have all the windows
17 in the neighborhood broken.

18 The same metaphor was applied in the '80s to the New
19 York City subway where you had graffiti on one car. If you
20 don't clean up one car, pretty soon all the cars are full of
21 graffiti.

22 So we are here in a sense as a private attorney
23 general to enforce the Copyright Act, to make sure that there
24 is an existing, fully functioning licensing market that will
25 not only compensate the creators of the copyrighted work but

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1 also aid in the progress of the useful arts by making sure
2 photographs are properly attributed and so that the copyright
3 owners are compensated for their contributions to society.

4 So we have said in the past and I've said it in my
5 papers, there is a jurisprudential disconnect between the
6 amount that's awarded on a default judgment. We have cited
7 cases in our brief which stand for the proposition that in a
8 single-image case you can get \$30,000. Our law firm alone has
9 obtained nine default judgments in the amount of \$30,000 that
10 is a single-image case without any proof of actual damages.

11 Where does that \$30,000 come from? Well, it's the
12 maximum amount provided for by the statute. It's not a number
13 that is arbitrary. So we've often said, \$30,000, that is an
14 ideal civil penalty to impose upon a large-scale corporation
15 for an infringement under the Copyright Act. So it is
16 justified by the statutory language, it is justified by the
17 custom and practice.

18 Default. How could a defaulting party be treated that
19 much worse than a defendant like BuzzFeed who happens to defend
20 itself but is found liable pursuant to the allegations of our
21 complaint. After all, fault is what? It just means that the
22 factual allegations of the complaint are deemed true. But if
23 we come into court after a year of hard-fought battle and we
24 establish the allegations of our complaint, why should BuzzFeed
25 treat it more favorably than the defaulting party.

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1 So for that reason your Honor would be certainly
2 justified in departing from this multiplier theory and imposing
3 a \$30,000 substantial penalty. As your Honor noted in the
4 motion in limine, it couldn't be appealed because if the
5 defendant were to file an appeal and say, well, there is no
6 connection between the actual lost licensing fee and the
7 \$30,000, we all know that in that case of Sohoys, the Second
8 Circuit has already held it doesn't need to.

9 So your Honor does have the discretion to depart from
10 using the actual fair market value, which has a degree of
11 speculation, in imposing the \$30,000. But even if your Honor
12 were to use the \$2,500 highest licensing fee on grounds that
13 all ambiguities are resolved against the infringer and times
14 that by 12, we still arrive at 30.

15 Let's move on to Count Two. CMI. According to the
16 case law, CMI exists to inform the public that a work is
17 copyrighted and by whom. So Ms. Lackman said it had something
18 to do with integrated systems or with metadata. It has nothing
19 to do with metadata. It's all about notice. It is all about
20 putting the world on notice as to who the copyright owner is.
21 You don't want an infringer to come along and take the work and
22 then pass it off as something else. That's the idea with CMI.

23 So the point of CMI is to inform the public that
24 something is copyrighted and to prevent infringement. That's
25 the point. It is not just to give credit to Mr. Mango. It is

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1 also to let the world know, as Mr. Mango testified, that he is
2 the owner of the copyright and if a media organization wants to
3 license it from him, they can contact him directly.

4 Now, here is their big argument on Count Two, which is
5 is that the statute does not require -- I'm sorry. Their big
6 argument is the CMI must be embedded in the metadata. As we
7 saw today, the metadata is invisible. So how does that conform
8 with the statute's purpose of informing the world.

9 The whole idea of CMI is that it needs to be visible.
10 That's where the gutter credit comes in. So there's no
11 shortage of cases where the courts have recognized, and
12 particularly Judge Nathan's decision in *Morel*, which I cited
13 earlier, that a gutter credit is a CMI. I believe Judge Nathan
14 also said in that case that it's just not credible that the
15 defendant wouldn't see the CMI, the gutter credit. It's just
16 almost as a matter of law it is presumed that the defendant who
17 uses the photograph saw the gutter credit.

18 So Mr. Haye's testimony that he didn't see it, even
19 putting aside credibility, we believe practically as a matter
20 of law he should be charged with such knowledge.

21 Now there are a couple cases which do say metadata and
22 CMI are not interchangeable. First is Judge Engelmayer's
23 decision in Fisher v. Forest, 2017 WL 299-2663, which says
24 literally, the terms metadata and CMI are not interchangeable.

25 Furthermore, although there is scarcely authority in

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1 this area, there is a case out of the district in Kansas where
2 the district court rejected the exact argument they are making
3 here. The court said: The defendant's argument that 1202(b)
4 is limited to CMI located within metadata, and recognizing that
5 CMI may include information regarding the author of the work
6 and the copyright notice displayed in connection with the
7 book's illustrations, and that's Tomelleri v. Zazzle, 2015 WL
8 8375083. So there that court rejected the idea that the CMI
9 must be embedded in the metadata.

10 Now, let's talk about the facts. Mr. Hayes knew that
11 the image was not obtained from Ms. Fisher. We have to really
12 carefully consider the chronology of events here.

13 So he contacts Ms. Fisher. I'd like you to comment on
14 the story. He says I need the comment quickly because he wants
15 to get the story up, and then he says also can you share a
16 photograph of Mr. Parker. She doesn't respond. He goes to The
17 New York Post website. He downloads it. He then says he
18 speaks to Ms. Fisher on the telephone.

19 I think your Honor may agree that Ms. Fisher's
20 testimony was -- she is an officer of the court in good
21 standing and her testimony was credible. Although she said she
22 didn't recall, she also said I can't imagine that I would
23 authorize Mr. Hayes to use a photograph in The New York Post.
24 I can't imagine any other lawyer who could imagine the same.

25 It would be one thing if Ms. Fisher provided him with

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1 the actual photograph. That would be a whole different fact
2 pattern. We wouldn't be here now if that was. But it's not
3 what happened here. He didn't get what he was looking for for
4 free, so he shoplifted it from The New York Post. Then based
5 on this theory of, oh, well I've gotten authority before from
6 lawyers, he then placed that Fisher & Taubenfeld gutter credit
7 there. And what was that? It was a false alibi. That's what
8 that was. It was a concealment. He was concealing the fact or
9 he was conveying the false impression that he was authorized to
10 use the photograph when he knew quite well that he wasn't, that
11 he hadn't received authorization, that he hadn't received the
12 photograph from Ms. Fisher, and that factual chronology alone
13 establishes the requisite intent that we need to prove the 1202
14 claim.

15 He acted with the required intent by distributing the
16 false CMI to BuzzFeed's audience knowing that Mango's CMI had
17 been removed. By the way, back to the Fisher v. Forest case,
18 which is Judge Engelmayer's decision, Judge Engelmayer did
19 recognize -- I'm sorry. Murphy v. Millennium Radio, which is a
20 Third Circuit case, 650 F.3d 295. It says: The mere fact that
21 Murphy's name appeared in a printed gutter credit near the
22 image rather than as data in an automated copyright protection
23 or management system does not prevent it from qualifying as CMI
24 or remove it from the protection of 1202.

25 The key point that I was making about the Fisher case

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1 is that it's not necessary that the plaintiff show that
2 Mr. Hayes removed the CMI. It's only that he distributed the
3 BuzzFeed article knowing that Mr. Mango's attribution had been
4 removed.

5 So in sum, on the 1202 claim we have certainly
6 shown -- we have met each of the requisite elements -- we have
7 shown the gutter credit is CMI, does not have to be metadata.
8 We have shown that Mr. Hayes distributed the article knowing
9 that there was a CMI that had been removed. Mr. Hayes did
10 testify that he was aware that Mango was the photographer of
11 the photograph. And, three, that BuzzFeed had reasonable
12 grounds to know that removal would facilitate infringement. In
13 other words, reasonable grounds to know, which comes right from
14 the statutory language, implies that there is a constructive
15 knowledge standard to be met. Did Mr. Hayes have reasonable
16 grounds to know that this would facilitate infringement?

17 I'd like to reiterate the point that, in the
18 defendant's brief they say, oh, well, his belief was based on
19 this idea that he had received press kits from lawyers in the
20 past. But when he appeared in court today, he didn't even know
21 what a press kit was and testified that he had never received a
22 press kit.

23 Now in terms of statutory damages on the 1202 claim,
24 we're seeking \$5,000. The statutory range is between 2,500 and
25 25,000. We are seeking five. Our law firm has actually

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1 obtained ten before on default, but because I represented to
2 Court back in December that we'd be seeking five, I felt like
3 out of consistency we would seek five. Ultimately we're
4 seeking an award of \$30,000 for Count One, \$5,000 on Count Two
5 and, as the prevailing party in this litigation, at least on
6 Count One and hopefully on Count Two and given that we believe
7 we have met our evidentiary burden of showing willfulness, we
8 believe that we qualify, of course within the Court's
9 discretion, for our attorney fees and costs which will serve
10 the deterrent effect. It's necessary to deter large-scale
11 corporations like BuzzFeed from infringing in the future.

12 Thank you, your Honor.

13 THE COURT: All right. Thank you.

14 All right.

15 MS. LACKMAN: Judge, do I have the possibility of
16 addressing --

17 THE COURT: No. There is no rebuttal in this district
18 after trials.

19 I am going to give the parties a last chance of two
20 weeks to see if you could arrange a resolution on your own and
21 after that I will issue a ruling as soon as possible
22 thereafter.

23 Thank you.

24 (Adjourned)

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